Supreme Court, U.S.
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No. .

In the

Supreme Court of the United States

ARTHUR M. WISEHART,

Petitioner,

v.

KELLWOOD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Arthur M. Wisehart
Pro se
Lincoln Building
60 East 42nd Street
Suite 764
New York, NY 10128
(212) 953-8926

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

215 pp

QUESTIONS PRESENTED

1. Whether the district court's confirmation of the imposition of a substantial sanction by arbitrators upon an attorney in connection with the arbitration of his client's age discrimination and related claims against his former employer, based upon one-half of the fees and expenses that the employer exclusively was required under the terms of the arbitration agreement to pay two of the three arbitrators, and its own counsel, should have been reversed?

2. Whether the United States Court of Appeals for the Second Circuit erred in concluding that the arbitrators had jurisdiction or authority to impose such a punitive sanction *sua sponte* on an attorney in an arbitration proceeding involving his client's age discrimination and related claims against his former employer and, if so, whether such action infringed constitutional free speech and due process rights?

3. Whether the district court's denial of petitioner's request for discovery and a hearing on disputed issues raised pursuant to Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, including whether there was evidence of partiality or corruption in the arbitrators, or whether they were guilty of prejudicial misbehavior or misconduct, should have been reversed by the United States Court of Appeals for the Second Circuit?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff was Charles S. Polin. His attorney was petitioner Arthur M. Wisehart.

Polin subsequently petitioned the district court for an order vacating the decision of the panel of arbitrators, and appealed its confirmation by the district court, but subsequently withdrew from the appeal, and the United States Court of Appeals for the Second Circuit granted leave to Polin's attorney to proceed as the appellant with respect to the sanctions imposed upon him.

The defendant-appellee in the courts below was the Kellwood Company, a public corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur M. Wisehart respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

In a Summary Order, the Court of Appeals for the Second Circuit affirmed a judgment by the district court denying a petition to vacate, and confirming an arbitration award.

The arbitration decision dismissed the plaintiff's age discrimination and related claims and ordered his counsel, who is the petitioner herein, to pay a punitive sanction in the amount of $153,237.64 based upon shifting to petitioner the cost of one-half of the fees and expenses that the Kellwood Company, the former employer, explicitly was required to pay two of the three arbitrators, and its own counsel, under the explicit terms of the arbitration agreement.

Petitioner seeks to appeal the confirmation of the imposition of that sanction by the arbitrators.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1291. The Order and Final Judgment of the district court was entered on July 26, 2000. (Petitioner's Appendix, "Pet.App.," 170a, 176a) The Summary Order of the United States Court of Appeals for the Second Circuit affirming the district court's final judgment was decided on April 23, 2002. (Pet.App. 1a) The Second Circuit's Order denying a timely petition for rehearing was filed on June 14, 2002. (Pet.App. 182)

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *"

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, pursuant to which the arbitration below was conducted, provides appellate jurisdiction for "a final decision with respect to an arbitration." *Id.* § 16(a)(3).

Section 10(a) of the Federal Arbitration Act provides in pertinent part as follows (9 U.S.C. § 10):

> "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration–
>
> "(1) Where the award was procured by corruption, fraud, or undue means.
>
> "(2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> "(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the

controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

STATEMENT OF THE CASE

Plaintiff Charles S. Polin filed an action against Kellwood Company, a manufacturer in the garment industry, in November 1993 in the United States District Court for the Southern District of New York with jurisdiction based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. Polin's complaint alleged age discrimination in violation of the New York City and State Human Rights Laws, fraud in the inducement and tortious interference in connection with the termination of his employment as Present of "She Knows!!", a start-up division that Kellwood formed to attract Polin from a competitor, and to exploit his outstanding skills in marketing what are known in the trade as "juniors," or "junior sportswear" for young women. C.A.App. A-19-39.

Following preliminary discovery, Polin suffered from financial reversals, and was unable to finance the continuing costs of the litigation. Unable to resume a satisfactory career in the garment industry, apparently as a result of retaliatory disparagement by Kellwood, blaming him for early losses experienced by "She Knows!!", despite the remarkably successful sales results for which Polin was responsible, he was forced to enter an entirely new field, and suffered substantial losses.

Aware of Polin's precarious financial condition, Kellwood threatened to resort to the usual weapon of employers' "litigation by attrition" strategy in discrimination cases by making a motion for summary judgment to prolong the agony and increase the litigation costs to a plaintiff, before the possibility of any remedy would be visible, unless Polin would consent to arbitration. Polin had no real choice in the matter because of his financial condition, so he was induced to give his consent.

The Agreement to Arbitrate Dispute, which is set forth in

Petitioner's Appendix at 184a-187a, as drafted by Kellwood's counsel, provided for three arbitrators. (*Id.* at 185a) Polin's partisan arbitrator was Martin Freeman, a person who had devoted his career to the garment industry in various sales capacities. Kellwood's partisan arbitrator was Kenneth D. Kleinman, Esq., a lawyer, and the parties jointly designated Jonathan S. Liebowitz, Esq., to serve as the designated "neutral" arbitrator (*id.* at 185a).

With respect to the arbitration expenses, the arbitration agreement provides as follows (Pet.App. 187a):

> "Kellwood will pay the administrative costs of the arbitration, the full costs of the arbitrator selected by Kellwood, and the full costs of the neutral arbitrator."

The arbitration hearing began in April 1998. Kellwood made a motion for judgment on partial findings on August 31, 1998. The arbitration panel's preliminary decision dated October 14, 1998, dismissing the age discrimination and fraud in the inducement claims without explanation, said it would provide a "written explanation of reasons . . . at the end of the case." (Pet.App. 97a-98a)

Arbitrator Freeman dissented from the dismissal of the age discrimination and fraud in the inducement claims. (Pet.App. 99a)

At the end of the case, on February 8, 1999, when the arbitrators issued their final determination, a "written explanation of reasons" regarding the dismissal of the age discrimination and fraud in the inducement claims still had not been provided by the arbitrators. (Pet.App. 101a-104a) In addition, the remaining claim for tortious interference was dismissed, also without providing reasons (*ibid.*), and sanctions were imposed upon the appellant, Polin's attorney, purportedly for "misconduct and contempt of the Panel." (Pet.App. 102a)

Contrary to the express terms of the arbitration agreement as quoted above, the arbitrators' sanction order dated February 8, 1999, required petitioner to reimburse for

one-half the amount of the fees and expenses that the Agreement to Arbitrate required Kellwood to pay neutral Liebowitz, and Kellwood's partisan arbitrator Kleinman, and Kellwood's counsel. (Pet.App. 102a)

The purported misconduct involved "litigating a claim for age discrimination with the Panel finds to be frivolous as a matter of law." (P.A 102a)

In addition, Polin's counsel was accused of allegedly prolonging the hearings "unduly," unjustly accusing Kellwood of "misconduct," and making a "false proffer of proof" concerning the expected testimony of a third party witness, Mr. Paul Celona. (*Ibid.*)

Polin's attorney also was found to be "in contempt of the Panel" allegedly because of a letter submitted to (but not accepted by) the American Arbitration Association for rulings on behalf of Mr. Polin dated October 23, 1998. (Pet.App. 102a) The letter, entitled "Request for Interpretation and Application of National Rules for the Resolution of Employment Disputes," sought rulings based upon the Rules of the American Arbitration Association. (Pet.App. 144a)

The letter was asserted by the arbitrators to be "in contempt of the Panel" notwithstanding the fact that the arbitration agreement specifically provides that "the arbitration hearing shall be conducted according to the Rules of the American Arbitration Association. . . ." (Pet.App. 185a)

Arbitrator Freeman provided a lengthy statement of his reasons for dissenting from the dismissal of the claim for fraud in the inducement as well as the age discrimination claim. (Pet.App. 140a-143a)

A further "Addendum to the Dissent" dated June 5, 1999, was also provided by Arbitrator Freeman. (Pet.App. 150a-154a)

In this dissent, Arbitration Freeman also referred to the letter by Polin's attorney requesting a ruling from the American Arbitration Association, and to the existence of extensive *ex parte* communications that he regarded as improper (Pet.App. 153a-154a). Arbitrator Freeman stated his view that as a result (*id.* 154a):

> "The process has been bastardized, and made the entire year a waste of time. I am curious as to how the AAA would react to this. Mr. Kleinman remarked he did some work for them. Would the ABA find this ethical? Would either body find this acceptable. I would hope not. I would hate to see the legal profession lower their standards. I would hope that the standards remain high. I would hate to believe that the public perception of lawyers as being people of low repute is justified."

Arbitrator Freeman indicated a further dissent in a document dated July 3, 1999. (Pet.App. 161a-162a) In that document, Arbitrator Freeman disclosed that Arbitrator Kleinman, a partisan arbitrator, selected and paid for his services by Kellwood, had undertaken the responsibility of preparing the opinion and award of the arbitration panel.

Arbitrator Freeman also disclosed that in doing so, Kleinman engaged in prohibited *ex parte* discussions with Steven R. Wall, Esq., counsel for Kellwood. Arbitrator Freeman emphatically stated that he believed such *ex parte* communications to have "contaminated" the arbitration (Pet.App. 161a-162a):

> "I cannot in good conscience agree to the award based on several items I have noted to both arbitrators left unanswered. The idea of "going along" and getting it finished with these questions hanging is unacceptable. I will list the areas which I question. Specifically I refer to calls between Mr. Kleinman and Mr. Wall. *** On 10/12/98 Mr. Wall called Mr. Kleinman to confer about the arbitration award. This call might have included Mr. Pollihan [Kellwood's in-house counsel] as well, but that is not certain. I wish to point out that all of this occurred prior to the defen[s]e case being presented and the uproar over the submission

> of Mr. Wisehart of the complaint to the American Arbitration Association. And on 11/2/98 a call from Mr. Wall to Mr. Kleinman relative sanctions, this being the Monday after the last hearing was held.
>
> "Subsequently on 2/14/99 a short call between the two (Wali & Kleinman) RE interpreting the award. Last, at least to my knowledge, was the 3/5/99 call in reviewed the opinion he [Kleinman] was writing on behalf of the panel with Mr. Wall. *** The worst part of this is that prior to this being known Mr. Liebowitz gave the approval to Mr. Kleinman to prepare the opinion and award. *** I must dissent on the award. I believe it is contaminated by the action I have mentioned herein. (Emphasis added.)

Arbitrator Freeman later recanted in a further document dated August 19, 1999. Freeman's subsequent version of what took place refers to additional *ex parte* discussions. His *ex post facto* memorandum condemning *ex parte* communications itself refers to further *ex parte* communications. (Pet.App. 163a-164a)

Further additional questions about what motivated arbitrator Freeman for his drastic change of mind, months after the arbitration decision was announced, is indicated by Freeman's statement in a telephone call to petitioner's office shortly before the appearance of Freeman's subsequent memorandum. In his telephone call to petitioner's office, Freeman gave a different version of what had transpired than what is stated in his memorandum, stating, "I'm scared stiff." (C.A. A-997)

What threats had been made to arbitrator Freeman to cause him to say "I'm scared stiff" are not known, but the existence of numerous *ex parte* communications presumably intended to put pressure on arbitrator Freeman to change his story are referred to in time records presented by the other

arbitrators. (C.A. A-996-99)

Although the situation was brought to the attention of the district court with petitioner's motion of August 9, 2000, requesting discovery and a trial on such issues (C.A. A-1777-79), the motion was denied.

The district court also denied discovery or a hearing, and mistakenly treated the motion as merely one for "reconsideration." (Pet.App. 6a) The prevalence of improper *ex parte* communications as described and condemned by Arbitrator Freeman was specifically brought to the attention of the district court in support of the motion. (C.A. A-1685-86)

The arbitrators issued a Memorandum Opinion dated June 23, 1999, imposing sanctions on petitioner as Polin's attorney in the amount of $145,452.6. The amount was calculated based upon one-half the amount that Kellwood was obligated to pay its attorneys and arbitrators Liebowitz and Kleinman for their services and expenses under the arbitration agreement. (C.A. A-739-742)

A "Second Supplemental Award" was issued dated October 20, 1999, bringing the total amount to $153,237.64 based upon the subsequent billings of the arbitrators and Kellwood's counsel in connection with the sanctions issue. The arbitrators directed Polin's attorney to pay the amount "promptly" to Kellwood notwithstanding the pending appeal. (C.A. A-1546)

The result was that petitioner, who had received nothing from his client Polin for his services in the arbitration proceeding, because of Polin's lack of financial resources, was forced to reimburse Kellwood for the fees of its attorney Wall billed at substantially more than $300 per hour (C.A. A-1068-69), and for the fees of the supposedly neutral arbitrator Liebowitz who billed Kellwood $2,000 per day, a rate that was double his usual per diem of $1,000 as filed by Liebowitz with the Federal Mediation and Conciliation Service. (C.A. A-1079-1080)

In addition, petitioner was required to reimburse Kellwood for its services to its partisan arbitrator Kleinman at one-half his billing rate of $280 per hour (C.A. 1052) for injurious *ex parte* activities that, as exposed in the dissent of

Arbitrator Freeman, had "bastardized" the arbitration process and made the entire year a "waste of time" (C.A. 154a).

According to Freeman's dissent, Kleinman himself had written the arbitration decision despite his admitted status as a partisan arbitrator, and had improperly resorted extensively upon *ex parte* communications with Kellwood's attorney Wall in the process. (C.A. 153a-154a)

The district court confirmed the imposition of sanctions on Polin's attorney. (Pet.App. 170a-171a) Further, in order to perfect the appeal to the Second Circuit, petitioner was ordered to file a supersedeas bond in the amount of $153,237.64. (Pet.App. 178a-181a)

Petitioner has since been compelled to pay the amount of the supersedeas bond, based upon the denial of a stay by the Second Circuit, which has resulted in substantial financial hardship to the petitioner.

The Second Circuit affirmed the district court's judgment in an abbreviated Summary Order dated April 23, 2002. (Pet.App. 1a-3a)

REASONS FOR GRANTING THE WRIT

Both the majority and dissenting opinions in *Green Tree Financial v. Randolph*, 531 U.S. 79, 148 L.Ed. 2d 373, 121 S.Ct. 513 (2000), support the certworthiness of the questions presented by the imposition of punitive sanctions by arbitrators upon a lawyer, who himself was not a party to the arbitration agreement, when his client Polin was forced to consent to arbitration or to forfeit his age discrimination and related employment claims because of the high cost anticipated in litigating them in the case pending in the district court.

The majority opinion in *Green Tree Financial, supra*, emphasizes the long established rule that the risks of arbitration cannot be imposed upon persons who have not consented to arbitration, stating (148 L.Ed. 2d at 382), "In determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to

arbitration...."

Equal Employment Opportunity Commission v. Waffle House, Inc., 534 U.S. 279, L.Ed. 2d 755, 122 S.Ct. 754 (Jan. 15, 2002), reinforces the principle that non-parties may not be subjected to the risks of arbitration.

The majority opinion in *Green Tree Financial, supra*, also leaves open the issue of whether the existence of prohibitive arbitration expenses would be grounds for invalidating an arbitration agreement. (148 L.Ed. 2d at 384)

Moreover, the dissenting opinion in *Green Tree Financial, supra*, discusses the public policy limits to which persons subject to arbitration agreement can be exposed, and quotes with approval (148 L.Ed. 2d at 385-86) the principle involved as stated in *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1483 (D.C. Cir. 1997), a principle the Second Circuit declined to address.

The Second Circuit *pro forma* Summary Order therefore is inconsistent with the analytical treatment of such issues required by both the majority and dissenting opinions of this Court in *Green Tree Financial, supra*.

I. ARBITRATORS MAY NOT IMPOSE OBLIGATIONS UPON NON-PARTIES

The issue presented is certworthy because at least two circuits and a host of district courts have held that a party will suffer per se irreparable harm if it is forced to arbitrate when it has not agreed to do so. Cf *McLaughlin Gormley King Co. v. Termininix Int'l. Co., L.P.*, 105 F.3d 1192, 1194 (8th Cir. 1997); *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507, 514-15 (3d Cir. 1990); *GTFM, LLC, v. TKN Sales, Inc.*, 2000 U.S. Dist. LEXIS 4488 at * 6 (S.D.N.Y. 2000) ("[A] party will suffer irreparable harm if compelled to arbitrate in the absence of any agreement to do so."); (*SEMCO, LLC v. Ellicott Mach. Corp.*, 1999 U.S. Dist. LEXIS 10710 at *8 (E.D. La. 1999)("Courts have recognized that the wrongful enforcement of an arbitration class in and of itself constitutes irreparable harm,"); *Chicago Sch. Reform Bd. of Trustees v. Diversified Pharm. Servs., Inc.*, 40 F. Supp. 2d 987 (N.D. Ill. 1999).

See also *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, L.Ed. 2d 755, 122 S.Ct. 754 (Jan. 15, 2002), holding that non-parties are not bound by an agreement to arbitrate.

The appeal therefore is certworthy because such questions of public policy are "Ultimately one for the courts," *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 76 L.Ed. 2d 298, 307, 103 S.Ct. 2177 (1983), but the court's below declined to consider the public policy and jurisdictional issues that had been raised.

Davis v. Prudential Securities, Inc., 59 F. 3d 1186, 1194, 1196 (11th Cir. 1995), states:

> "The [Federal Arbitration Act] provides that a court may vacate an award by an arbitration panel "where the arbitrators exceeded their powers." *9 U.S.C. § 10*(a)(4). In addition, the FAA allows a court to modify or correct the award "where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted." *9 U.S.C. § 11*(b). Thus, "the law is well-established that an arbitrator "can bind the parties only on issues that they have agreed to submit to him.' " *Butterkrust Bakeries v. Bakery, Confectionery and Tobacco Workers Int'l Union, AFL-CIO, Local No. 361, 726 F.2d 698, 700 (11th Cir.1984)*(quoting *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1, 611 F.2d 580, 583 (5th Cir.1980))."* (Footnote omitted.)

The Court further stated at (59 F.2d 1196):

> "Because the issue of attorneys' fees was not actually submitted to the arbitration panel for determination, we also hold that the

> arbitrators' decision on attorneys' fees exceeded the scope of their powers and that the district court erred in confirming that portion of the award."

II. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE ARBITRATORS' WERE AUTHORIZED TO IMPOSE PUNITIVE SANCTIONS UPON A NON-PARTY ATTORNEY

The Second Circuit erred in deciding that arbitrators may decide for themselves whether the imposition of severe sanctions upon a non-party to the arbitration agreement is "in accordance with applicable law." (Pet.App. 3a)

Arbitrators must have explicit contractual authorization before they can award punitive damages. Compare *Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico*, 692 F.2d 210, 214 (1st Cir. 1982) ("the arbitrator's opinion cites no provision of the [collective bargaining] contract authorizing punitive damages"); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1164 (7th Cir. 1984) ("arbitrators are rarely thought authorized to award punitive damages"), *cert. denied*, 469 U.S. 1160, 83 L.Ed. 2d 926, 105 S.Ct. 912 (1985).

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE IMPOSITION OF SANCTIONS UPON AN ATTORNEY WITHOUT REQUIRING A HEARING BY THE DISTRICT COURT ON DISPUTED ISSUES

Section 10(a) of the Federal Arbitration Act provides in pertinent part as follows (9 U.S.C. § 10):

> "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to

the arbitration -

> "(1) Where the award was procured by corruption, fraud, or undue means.
>
> "(2) Where there was evidence partiality or corruption in the arbitrators, or either of them.
>
> "(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

As held in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147, 21 L.Ed. 2d 301, 304, 89 S.Ct. 337 (1968), evident partiality on the part of the arbitrators due to a financial interest in the sanctions proceeding that they instituted *sua sponte* mandated that their decision be vacated because the provisions of the Federal Arbitration Act "... show a desire of Congress to provide not merely for *any* arbitration but for an impartial one." (Emphasis in original.)

The arbitrators had a direct financial interest in the *sua sponte* sanctions proceeding that they instituted since it increased the fees that they received as a result of an increase in their compensable time. By commencing the unauthorized sanctions proceeding against a non-party attorney, they rewarded themselves by increasing their own compensation for the additional time that the sanctions proceeding entailed under their previous determination that half of such increase in their compensation would be extracted from Polin's counsel at the premium rates that Kellwood had negotiated to pay two of the three arbitrators and its counsel.

Commonwealth Coatings Corp. v. Continental Cas. Co., *supra*, emphasizes that a constitutional principle was involved as well as the requirements of the Federal Arbitration Act,

relying upon *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927). Because a small part of the judge's income in *Tumey* was derived from convicted defendants, due process rights were violated.

Although the issue had been raised, however, neither the district court nor the panel that affirmed its decision confirming the imposition of sanctions made findings or gave it consideration.

The Second Circuit's Summary Order states that the rules of the American Arbitration Association "allow arbitrators to require reimbursement of attorney's fees [not arbitrators' fees] in accordance with applicable law." (Pet.App. 3a)

Although the provision prohibiting such action under New York law was called to the Second Circuit's attention, it erred in declining to decide the issue.

Section 7513 of the New York Civil Practice Law and Rules specifically provides:

> "Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorney's fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. The court, on application, may reduce or disallow any fee or expense it finds excessive or allocate it as justice requires." (Emphasis added.)

A violation therefore occurred with respect to the requirement that questions of law be decided *de novo* in reviewing the confirmation of an arbitration award, as stated in *First Options v. Kaplan*, 514 U.S. 938, 948, 131 L.Ed.2d 985, 115 S. Ct. 1920, 1926 (1995).

Moreover, in his dissenting opinion, Arbitrator Freeman invalidated the decision by his disclosure that extensive *ex parte* communications had occurred. (Pet.App. 150a, 153a-154a, 161a) Freeman explicitly stated the view that the *ex parte* communications (which included discussions with opposing counsel) "contaminated" the arbitration decision

(Pet.App. 162a). Earlier, Arbitrator Freeman said that the arbitration procedure had been "bastardized" as a result of the *ex parte* communications making the entire year "a waste of time." (Pet.App. 154a)

Arbitrator Freeman later appeared to change his mind but no hearing was conducted upon the circumstances that induced him to make this abrupt and drastic change. However, it appears that it occurred on the basis of still further *ex parte* communications and improper pressures put on Freeman in the process. Thus the statements by arbitrator Freeman in his dissents are evidence of the existence of substantial bad faith on the part of two arbitrators and Kellwood's counsel. See *Totem Marine Tug & Barge, Inc. v. North Am. Towing, Inc.*, 607 F.2d 649 (5th Cir. 1979), in which the Court set aside an arbitration award because of prejudicial *ex parte* communications.

Discovery as to such important issues was denied, however, contrary to *National Hockey League Players' Association v. Bettman*, 1994 U.S. Dist. LEXIS 1160 (S.D.N.Y. 1994) at ** 5-7, which holds that discovery is available in court proceedings to vacate an arbitration decision relevant to arbitral bias or misconduct:

> ". . . requested discovery that is plainly relevant to colorable claims of arbitral bias or misconduct may properly be granted. See, e.g., *Sanko S.S. Co. v. Cook Indus. Inc., 495 F.2d 1260, 1263 (2d Cir. 1973)* (directing evidentiary hearing on claim of bias); *United Food & Commercial Workers Int'l Union v. SIPCO, Inc., 1990 WL 364772* at *4 (S.D. Iowa Oct. 16, 1990). See also *Legion Ins. Co. v. Insurance Gen. Agency Inc., 822 F.2d 541, 542-43 (5th Cir. 1987); Totem Marine Tug & Barge Inc. v. North American Towing Inc., 607 F.2d 649, 653 (5th Cir. 1979); [*6] Austin South, Ltd. v. Barton-Malow Co., 799 F. Supp. 1135, 1144 (M.D. Fla. 1992); United Transp. Union v. Springfield Terminal Ry.*

> *Co., 132 F.R.D. 4, 7-8 (D. Me. 1990)* (discovery appropriate concerning communications going to bias of the arbitrator). Cf. *First Interregional Equity Co. v. Haughton, Cahill, Lombardi, Schwartz, Merlin Baines & Co., 805 F. Supp. 196, 1994 WL 21257* at *4 (S.D.N.Y. 1992) (bias challenge to an arbitrator's decision requires a fact-bound inquiry); *Nasta v. Paramount Pictures Co., 1991 WL 183353* at *4 (several years of discovery produced no evidence of ex parte communications by the arbitrator that would show bias. Indeed, if there is reason to question the conduct of the arbitrator, he himself may be called upon to testify. See, e.g., *Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1489 (9th Cir. 1991)* (rejecting bias claim principally on basis of arbitrator's testimony); *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 429 F. Supp. 452, 457 (E.D. La. 1977)* (rejecting misconduct [*7] claim based on three arbitrators' testimony), rev'd, *607 F.2d 649 (5th Cir. 1979)* (appellate court finds misconduct based on arbitrators' testimony)."

Also involved are important public policy issues that the Second Circuit declined to determine.

In *Green Tree Financial v. Randolph*, 531 U.S. 79, 148 L.Ed. 2d 373, 383, 121 S.Ct. 513 (2000), the Court noted that "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum," but declined to decide the question because the record was only speculative in that respect. (148 L.Ed. 2d at 383.)

The record on the issue in the instant case, however, is not speculative. The sum of $153,237.64 imposed in the form of sanctions on the plaintiff's attorney is neither speculative nor insignificant.

It is not disputed that, because of financial problems, plaintiff Polin was unable to finance the continuing cost of litigating his age discrimination and related claims in the case pending in the federal district court.

Moreover, his attorney, as a solo practitioner of advancing years (age 74), upon whom the financial consequences of the ire of the arbitrators was directed, was required to pay the arbitrators' punitive sanction imposed from capital since his client Polin was unable to pay him any fees or expenses incurred for his services during the course of the arbitration.

Purely on economic grounds, the result is wholly incompatible with the purpose of the Federal Arbitration Act as expressed in *Green Tree Financial, supra.* (148 L.Ed. 2d at 382-3)

Taking as a given the principle that the purpose of the Federal Arbitration Act was to remove the prevailing hostility toward arbitration agreements, the decision below, unless reversed, will have the opposite effect. Otherwise the risks to which it subjects victims of discrimination who are financially unable to meet the costs of litigating their rights before a jury and an informed Article III judge, in accordance with their statutory and constitutional rights, would be contrary to public policy.

Moreover, the risks to which such a result exposes lawyers willing to prosecute such claims on behalf of impoverished clients would be an incalculable deterrent to arbitration as an acceptable form of "alternative dispute resolution."

Since the issue presented has not been decided by this Court, therefore, it warrants consideration, particularly in view of the following statement from the dissenting opinion in *Green Tree Financial v. Randolph*, 531 U.S. 79, 148 L.Ed. 2d 373, 385-6, 121 S.Ct. 513 (2000):

> ". . . the "who pays" question presented in this case did not arise in Gilmer. Under the rules that governed in Gilmer [*Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 114 L.Ed.

> 2d 26, 111 S.Ct. 1647 (1991)] – those of the New York Stock Exchange – it was the standard practice for securities industry parties, arbitrating employment disputes, to pay all of the arbitrators' fees. See *Cole v. Burns Int'l Security Servs., 323 U.S. App. D.C. 133, 105 F.3d 1465, 1483 (CADC 1997)*. Regarding that practice, the Court of Appeals for the District of Columbia Circuit recently commented:
>
> > "In Gilmer, the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims. There is no reason to think that the Court would have approved [***386] arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case." Id. at 1484."

Petitioner was not a party to the arbitration agreement and only witnessed his client's signature as an attorney. (Pet.App. 187a-188a) Moreover, his client that Polin felt compelled to sign it only because he otherwise his claims would be dismissed as a result of his precarious financial condition. (Pet.App. 187a-188a)

The Second Circuit's decision therefore is inconsistent with the Ninth Circuit's decision in *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991), which holds that a non-party to an arbitration agreement may not be subjected to arbitration, and also is contrary to the Fourth Circuit's decisions in *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), refusing to enforce an arbitration agreement based upon the degree of control that *Hooters* exercised over the arbitral panel.

As stated in *Matter of Yagman*, 796 F. 2d 1165, 1184-5

(9th Cir. 1986):

> "In addition, the award entirely fails to consider Yagman's ability to pay such an immense sum which, in our view, is another factor relevant in determining reasonableness. See *Colucci v. New York Times Co., 533 F. Supp. 1011, 1013 (S.D.N.Y. 1982)*. In short, the district court does not appear to have determined in any way whether the sanctions award complies with the reasonableness requirement and, thus, we hold that the award constitutes an abuse of discretion."

The Second Circuit's decision also is in conflict with *Bradford v. Rockwell Semiconductor Systems Incorporated*, 238 F.3d 549 (4th Cir. 2001), which requires a case-by-case analysis of the effect of imposing arbitration fees on anti-discrimination claimants, and notes a split in the Circuits on whether the imposition of such fees on claimants (or, by extension, upon their attorneys) are *per se* unlawful forum fees assessed by arbitrators.

See also *Paladino v. Avnet Computer Techs. Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) ("'fee-shifting' is a per se basis for nonenforcement"); *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999) (adopting *Cole* standard on fees); and *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999) (same).

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L.Ed. 2d 26, 111 S.Ct. 1647 (1991), indicates that disputed issues such as those left undecided by the courts below should have been resolved by them (500 U.S. at 33):

> "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for the revocation of any contract." Mitsubishi, 473 U.S, at 627, 87 L.Ed.

2d, 444, 105 S.Ct. 3346. There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases." (Emphasis added.)

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Arthur M. Wisehart
Petitioner Pro Se
Lincoln Building
60 East 42nd Street
Suite 764
New York, New York 10128
(212) 953-8926

Dated: September 12, 2002

(any footnotes trail the end of each document)

00-9184

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CHARLES S. POLIN, Plaintiff,
ARTHUR M. WISEHART, Appellant,

v

KELLWOOD COMPANY, Defendant-Appellee.

April 23, 2002, Decided

COUNSEL:
FOR APPELLANT: Arthur M. Wisehart, New York, NY.

FOR APPELLEE: Steven R. Wall, Morgan, Lewis & Bockius LLP, Philadelphia, PA.

JUDGES:
PRESENT: HON. JAMES L. OAKES, HON. DENNIS JACOBS, HON. GUIDO CALABRESI, Circuit Judges.

OPINION:

[*406]

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

[*407] Arthur Wisehart appeals from orders of the United States District Court for the Southern District of New York (Owen, J.) denying a motion to vacate an arbitration award.

Wisehart represented plaintiff Charles Polin in an action against defendant-appellee Kellwood Co., Polin's former employer. Polin sued Kellwood in the Southern District of New York in 1993, alleging tortious interference, fraud in the inducement, and age discrimination in violation of the New York Human Rights Law ("NYRHL") and the New York City Human [**2] Rights Law ("NYCHRL"). After several years of litigation, the parties submitted the matter to binding arbitration. On February 9, 1999, having earlier dismissed Polin's fraud in the inducement and age discrimination claims, the panel dismissed the tortious interference claim and sanctioned Polin's counsel, Wisehart, on multiple grounds including, inter alia, filing a frivolous age discrimination claim, making false representations to the panel (including a false proffer of a witness's testimony that delayed the proceedings), making false accusations about the conduct of Kellwood and its counsel, unauthorized tape-recording of a telephone conference with Kellwood's counsel and one of the arbitrators, and prolonging the arbitration with needless, prolix questioning of witnesses and spurious objections. This misbehavior significantly harmed Kellwood, which had agreed in the arbitration agreement to bear the fees of two of the three arbitrators as well as administrative costs. Wisehart was ordered to pay $ 153,237.64, representing one-half of Kellwood's arbitration fees and expenses, excluding witness fees.

Polin subsequently moved the district court for an order vacating the arbitration [**3] award. The district court denied Polin's motion and confirmed the award, finding that Polin had failed to establish [1] any of the specific grounds for vacatur under the Federal Arbitration Act, 9 U.S.C. § 10(a), or [2] that the arbitration panel acted in manifest disregard of the law. Notices of appeal were filed, but Polin withdrew his appeal on August 17, 2001, and we allowed

Wisehart to proceed as appellant with respect to the sanctions award imposed on him.

We affirm for substantially the reasons stated in the district court's thorough opinions of June 29, 2000 (denying Polin's motion for vacatur) and November 2, 2000 (denying his motion for reconsideration). On appeal, Wisehart has cited no sufficient ground for reversal. Without addressing the findings as to his own misconduct, Wisehart makes charges of corruption, partiality, and misconduct on the part of the arbitrators – which are wholly unsubstantiated and meritless. He also continues to assert that the panel's sanctions award was unauthorized because it required Wisehart to pay expenses that the arbitration agreement allocated to Kellwood. But the arbitration agreement gives the panel "the authority [**4] to provide whatever remedies are currently available under the law for the claims asserted by Polin," and it expressly incorporates the rules of the American Arbitration Association, which allow arbitrators to require reimbursement of attorney's fees "in accordance with applicable law."

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

93 Civ. 7876 (RO)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES S. POLIN, Plaintiff,

v

KELLWOOD COMPANY, KELLWOOD SPORTSWEAR, ENOCH HARDING, JR., and HARRY HOLDING, Defendants.

October 31, 2000, Decided

November 2, 2000, Filed

COUNSEL:
For Plaintiff: Arthur M. Wisehart, Esq., Wisehart & Koch, New York, New York.

For Defendants: Christopher A. Parlo, Esq., Steven R. Wall, Esq., Melissa C. Angeline, Esq., Morgan, Lewis & Bockius, New York, New York.

JUDGES:
Richard Owen, United States District Judge.

OPINION BY:
Richard Owen

OPINION:
OPINION AND ORDER

OWEN, District Judge:

Plaintiff Charles S. Polin moves for "Reconsideration" n1 of an Opinion and Order dated June 29, 2000, and the resulting Final Order and Judgment entered on July 26, 2000, which granted defendant Kellwood's motion to confirm the arbitration award and the sanctions against plaintiff's counsel, and denied plaintiff's motions to vacate the opinion of the arbitrators.

The facts of this case are extensively set forth in my forty-four page opinion of June 29, 2000. See *Polin v. Kellwood, 103 F. Supp. 2d 238 (S.D.N.Y. 2000)*. Briefly, **[**2]** this litigation started in this Court in 1993 when plaintiff, the former president of She Knows!!, a division of Kellwood, alleged that he was fraudulently induced by Kellwood to accept employment; that defendants Harding, head of Kellwood Sportswear, and Kellwood Sportswear itself, tortiously and negatively interfered with his employment relationship with Kellwood; and that Kellwood then terminated his employment in an act of wrongful age discrimination. After four years of pre-trial litigation and several discovery disputes, the parties entered into a written Arbitration Agreement and began arbitration in April 1998, and the action in this Court was placed on the suspense calender. On April 10, 1999, the panel of arbitrators issued a forty-six page opinion detailing the basis for its earlier February 8, 1999 unanimous dismissal of Polin's age discrimination and tortious interference **[*128]** claims; a 2-1 finding in favor of Kellwood on the fraudulent inducement claim; and unanimously directing Polin's counsel, Arthur M. Wisehart, for what it described as Wisehart's "misconduct...bad faith...vexatiousness...and...contempt of the Panel," personally to pay Kellwood for half its arbitration **[**3]** expenses. (Opinion of Arbitrators, Appendix B hereto, at 13).

Plaintiff Polin thereafter moved this Court to vacate the Award of Arbitrators and for the first time for an award of monetary damages against Kellwood's counsel and its law firm, Morgan, Lewis & Bockius LLP on: 1) an "entrapment"

theory regarding a completely separate case Wisehart had earlier handled against Morgan Lewis, and 2) for treble-damages on an "extortion" theory for their sending a letter to Wisehart seeking payment of the arbitrators' award to them (see above). n2 Kellwood cross-moved to confirm the award. This Court's Opinion and Order of June 29, 2000, and Order and Final Judgment entered on July 26, 2000, confirmed the award and denied Polin's motions in their entirety. Plaintiff appealed to the Second Circuit on July 10, 2000. Plaintiff thereafter moved before me on August 9, 2000 for "Reconsideration" to correct and modify the judgment (see Appendix A hereto), and for a stay of execution pending decision on the motion. Plaintiff, however, having earlier filed a notice of appeal, this Court no longer had jurisdiction over this matter, n3 and accordingly on September 5, 2000, I denied consideration of **[**4]** his motions on that ground. Plaintiff then asked the Second Circuit to remand to this Court to consider his motions, which was granted on October 3, 2000. Plaintiff's motion for "Reconsideration" is now before me and I address it.

A motion for reconsideration "may be granted only where the Court has overlooked matters or controlling decisions which might have materially influenced the earlier decision." *Digitel, Inc. v. MCI Worldcom, Inc., 2000 U.S. Dist. LEXIS 10160, *1, 2000 WL 1010827* (S.D.N.Y. July 21, 2000) (citing *Enzo Biochem, Inc. v. Johnson & Johnson, 866 F. Supp. 122, 123 (S.D.N.Y. 1994)).* **[**5]** The scope of review on a motion for reconsideration is narrow, applying only to issues that the Court has already considered. It is not a substitute for appeal. See *Morales v. Quintiles Transnat'l Corp., 25 F. Supp. 2d 369, 372 (S.D.N.Y. 1998).*

In light of this standard of review, I make two observations at the outset. First, it seems appropriate to repeat my prior observation that "as to the panel's determination on the merits...there is no legal or factual basis whatever to put the panel's findings or conclusions in any question were there not a plethora of alleged collateral issues raised by Polin and Wisehart...." *Polin v. Kellwood, 103 F. Supp. 2d at 247.*

Second, I observe that almost all of the numerous grounds asserted in this present motion have been discussed in exhaustive detail both in the Opinion of the Arbitrators and this Court's Opinion and Order of June 29, 2000 and need not be addressed further. The two issues I do address herein are those that while plaintiff did previously raise before me and I did address them, they now require further addressing because of the new ways in which plaintiff and his counsel have tried to recast and **[**6]** support their assertions.

The first is as follows. As explained and dealt with in my June 29, 2000 opinion, on October 23, 1998, Wisehart wrote and delivered a letter to the American Arbitration Association ("AAA") in which he asserted several highly derogatory and damaging factual statements as to the alleged **[*129]** conduct of the neutral arbitrator, Jonathan Liebowitz. Among them was the allegation that in an off-the-record discussion on August 8, 1998, Liebowitz "stated that if counsel for Mr. Polin states that he has not received a fair hearing, he [Liebowitz] will abandon the case and will decline to decide the dispute to be arbitrated." n4

As to this letter, on October 28, 1998, after the close of the proof taking, the panel afforded Wisehart an opportunity to tell it the basis of his letter to the AAA. Arbitrator Kleinman, presiding **[**7]** since the letter attacked Liebowitz, set up the parameters of the inquiry as follows:

ARBITRATOR KLEINMAN: The purpose [of this inquiry is that Wisehart's] letter of October 23, 1998, among other things, constituted a direct attack on the integrity of the Panel and specifically Arbitrator Liebowitz, a direct attack. And that attack is based upon beliefs, according to the letter. We don't know where those beliefs came from, because it's certainly not in the record as far as an attack, why his integrity, why there should be a challenge to the fact that Arbitrator Liebowitz would rule a certain way on procedural or substantive issues because of an alleged concern that he wouldn't get paid.

This is as serious an accusation that can be made against an Arbitrator or a judge, for that matter. It can't be any more

serious than that. That is Mr. Liebowitz's livelihood, which is in part controlled by the American Arbitration Association. These are extremely serious allegations Mr. Wisehart has leveled against him.

It is our intent to ask him why he leveled those accusations and the basis for those accusations, because we don't know what the basis of that is. To us, upon reviewing the [**8] record, we don't believe there is a basis for that. (Tr. of Oct. 29, 1998, at 35-36).

Wisehart's response to this was to "decline" to respond "on constitutional grounds as well as jurisdictional grounds." (Id. at 62). At the same day's session where Wisehart declined to support the statement, Steven R. Wall, attorney for Kellwood, said, "I will state unequivocally now and under oath that that comment alleged to have been stated by Arbitrator Liebowitz did not occur, that the accusation in the letter of October 23 is a complete fabrication." (Id. at 47). Thereafter, at no time before the arbitrators did Wisehart assert in any way that the contents of his Oct. 28, 1998 letter had any basis in fact.

The above was the record on which the arbitrators reached their decisions. Thereupon the matter came before me on cross motions to vacate or confirm the arbitrators' ruling. One of Wisehart's arguments in the papers before me was that "Liebowitz's partiality is shown by his alleged August 7, 1998 threat to discontinue unless at the conclusion of the hearings Polin...states that he had received a full and fair hearing." In my opinion that followed, I wrote, "Since *Wisehart* [**9] *is the only one asserting this conversation ever took place, and he has submitted no affidavit as to its existence*, this issue is therefore not competently before me, and I decline to address it." *Polin, 103 F. Supp. 2d at 259.*

Now, on the third go-around – in his motion for reconsideration – Wisehart submits an affidavit of August 9, 2000, stating under oath: "At that time [of the alleged August 7, 1998 off-the-record conversation], Arbitrator Liebowitz repeated that he would walk away from the arbitration hearing if at the conclusion of the hearing the undersigned [i.e., Wisehart] stated that Mr. Polin had not received a full and fair hearing." (Wisehart Aff. P 49).

[*130] Thus, this is the first time that Wisehart has asserted this allegation under oath. Repeating, Wisehart first put this allegation in his unsworn letter to the AAA, and then invoked the Constitution when asked to explain its basis. He submitted nothing competent on the issue when before me on plaintiff's motion to vacate. Therefore, Wisehart having at two earlier stages declined the opportunity at each to put this alleged fact in issue, I decline to permit him to do so now. First, I note in passing **[**10]** that this is a motion for reconsideration and is limited to the record as to which reconsideration is sought. It does not permit the building of a different record (see supra, p.3). But second, and of dispositive force, analogizing this to dispositive motions, the law is that a party cannot create a material issue of fact by submitting an affidavit that contradicts its own prior deposition testimony. See, e.g., *Hale v. Mann, 219 F.3d 61, 74 (2d Cir. 2000)* ("It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment" (quoting *Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987)).* The dispositive motion before me presents a situation to which this logic clearly applies. At the arbitration panel proceeding convened to determine the basis for Wisehart's allegations against Liebowitz, Wisehart declined to respond on "constitutional grounds," which I can only assume refers to the Fifth Amendment. In civil cases, a party's invoking his Fifth Amendment privilege against self-incrimination allows the court to draw an adverse inference. See **[**11]** *S.E.C. v. Princeton Econ. Int'l Ltd., 73 F. Supp. 2d 420, 1999 WL 997149,* at *3 (S.D.N.Y. 1999); *S.E.C. v. Scott, 565 F. Supp. 1513, 1533 (S.D.N.Y. 1983).* I draw such an adverse inference here from Wisehart's refusal to answer the questions of Arbitrator Kleinman about the basis of his letter to the AAA. I emphasize that at the second stage when this issue was before me as part of his motion to vacate, he offered nothing there either. Now he attempts to create a material issue of fact by putting this allegation under oath in his belated affidavit, which is in contradiction of his prior stands on this issue. In the interests of finality and

fundamental fairness to Kellwood, it is simply too late for Wisehart to reverse himself to create an issue. Accordingly, I do not accept this attempt to put his allegation before me.

The second issue that I feel requires some readdressing is plaintiff's request for a jury trial on the issue of "whether the imposition of sanctions upon counsel for petitioner with the purpose and intent of retaliating against petitioner by crippling his counsel and his ability to pursue this litigation violates petitioner's right to be represented by counsel. **[**12]** " (Pet'r Not. of Mot. dated Aug. 8, 1999). I addressed a similar contention by Wisehart in my Opinion and Order of June 29, 2000. There he contended that the "punitive award of sanctions against petitioner's counsel [Wisehart] is an attempt by respondents' counsel [Wall] in collusion with arbitrators Liebowitz and Kleinman to obstruct justice by incapacitating petitioner's counsel to make it impossible to prosecute claims for obstruction of justice...." (Pet'r Mem. of Law in Supp. dated Nov. 8, 1999, at 15). Just as there was not a scintilla of support for the earlier assertion, there is no support for the present assertion, and the present assertion begs both a similar analysis and conclusion.

I emphasize that it was the Panel of Arbitrators, and not this Court, that assessed the payment of half of Kellwood's arbitration costs against Wisehart, and that even if the agreement had not endowed the panel with the power of a court, "arbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997)* **[**13]** (citation omitted). The panel went to great lengths in its opinion to **[*131]** explain the factual bases for all its conclusions, n5 and I thoroughly considered plaintiff's numerous, often-repetitiously stated objections to the award in my Opinion and Order of June 29, 2000. For all of these reasons, plaintiff's attempt to reopen the issue by casting various allegations in a slightly different light is wholly without merit.

Another accusation that calls for brief re-mention is Wisehart's assertion that counsel for Kellwood destroyed evidence that was important to plaintiff's case. In his earlier motion to vacate, plaintiff asserted that Kellwood's disposal of several bolts of cloth and product samples produced by Enteks after the case was over was a deliberate destruction of relevant evidence. I noted at the time that the panel considered this claim and specifically found that the bolts of cloth and product samples were not relevant to this case. I also noted that in addition to the panel's **[**14]** determination, plaintiff was given an opportunity to examine the original cloth patches cut from the Enteks garment. See *Polin, 103 F. Supp. 2d at 258.*

Now, in papers submitted to this Court just a few weeks ago, Wisehart attempts to reargue and aggrandize this alleged spoliation of evidence claim by asserting that "the Enteks litigation is the centerpiece of Polin's tortious interference claim..." (Pl. Rep. Mem. in Support of Stay, dated Oct. 10, 2000, at 7). But the panel did consider it, obviously with appropriate thoroughness, the panel's - transcript of September 18, 1998 at 1494 reading:

MR. WISEHART [addressing Mr. Wall, Kellwood's counsel]: "In [Entek], you destroyed the samples that [Celona] turned over to you from that company. That's certainly evidence from which an adverse inference can be brought about the destruction of evidence. We're entitled to have that information on the record.

ARBITRATOR LIEBOWITZ: Give us a break, will you, you made that argument in the transcript from way back. I've read every I and T and all the other letters in the alphabet in the record. We have heard that one. (Conf. Tr. of Sept. 18, 1998, at 1494).

I did **[**15]** not, and do not, find the panel's conclusion in its opinion – that "[the] several bolts of cloth and product samples...were not relevant to ths case, and were disposed of after unrelated litigation was settled" – unjustified in any way, and I therefore reject Wisehart's attempt to reopen an issue that was fairly decided by the panel and confirmed by

this Court in a previous opinion. See *Polin, 103 F. Supp. 2d at 258.*

I must note that on not only the record before the arbitrators, but also given the standard applicable to review, n6 these continued allegations of foul play in the panel's conduct seem to be the distressing standard of approach here. The panel's assessment of Wisehart's conduct and the remedy imposed was made on a record that factually and legally fully supported it. Further, the panel went to considerable pains to lay out the justification for its assessment:

The panel believes that it has an obligation to protect the forum. If the type of conduct engaged in by Wisehart were permitted to go unremedied, resort to arbitration to resolve employment discrimination and related claims would be discouraged. That is because parties know that a Federal **[**16]** Judge would be most unlikely to condone the kind of conduct in which Wisehart engaged; his approach to arbitration appears to have been that, since the arbitrators were not judges, 'anything goes.' [...] If an attorney were free to disregard and **[*132]** flaunt the authority of the arbitral forum, those benefits would be lost; the interest of the Federal and other courts in following the national policy of promoting arbitration as a means of resolving disputes would be frustrated. (Opinion of Arbitrators, at 33; at 3 of Appendix B hereto).

This approach by Wisehart has continued into his most-recent October 20, 2000 "Supplemental Memorandum" for which he sought and was granted leave, but which, when filed, was essentially a baseless irrelevant smearing attack on a young associate attorney for Kellwood, Melissa C. Angeline. (Pl. Supp. **[**17]** Mem. in Support of Stay, dated Oct. 20, 2000).

First, therein Wisehart attacks what he describes as "Relevant to the unreliability of the statements to the Court by Ms. Angeline, is that she has previously misled your Honor

about its supposed lack of jurisdiction at the proceeding on September 5, 2000..." based upon "Ms. Angeline's insistence upon misdescribing petitioner's motion dated August 9, 2000, as a 'motion for reconsideration'" (Id. at 2) (emphasis supplied) when she contended I had no jurisdiction to hear his post-appeal motion. n7 But attached as Appendix A hereto is the cover sheet and page one of Wisehart's August 9, 2000 memorandum of law on this issue, both of which bear the title: "Memorandum of Law in Support of Petitioner's Motion for Reconsideration" (emphasis supplied). I therefore find no merit in Wisehart's claim of misdescription when Wisehart himself captioned the proceeding a "Motion for Reconsideration."

Second, and as an apparently gratuitous besmirching **[**18]** addendum, Wisehart asserts in these pages that

at the argument before the Second Circuit on October 3, 2000, Ms. Angeline, upon inquiry from the Court, admitted that she was not qualified under its requirements to appear before the Court, and was admonished not to do it again until she is qualified to do so. (Id. at 3-4) (emphasis supplied).

The accusation of "admonishment" by the Court is contrary to fact, for on the tape of the argument in the Court of Appeals on that day one hears:

Ms. Angeline: Ms. Melissa Angeline from Kellwood Company.

* * *

Judge Calabresi: I think the first thing that we must do is – you have asked to be appointed pro hac vice?
Ms. Angeline: Correct, your Honor.

* * *

Judge Calabresi: Have you applied for admission to the Circuit?
Ms. Angeline: I have not applied for –
Judge Calabresi: – regular –

Ms. Angeline: – regular admission. I do not meet the requirements for that.
Judge Calabresi: Well, we will grant you permission to appear pro hac vice, but as soon as you meet the requirements you should apply because when you meet the requirements and do not apply we can't generally – tend not to admit people **[**19]** pro hac vice.

Normally, I would not have ventured into the colloquially-described "he said, she said" rather irrelevant facts here. However, in this case, the attacks seemed so unfounded and unfair to Ms. Angeline that if unjustified, as it quickly developed, the record should be clear as to the propriety of her conduct as a member of the bar.

In light of the foregoing, and of all previous analysis undertaken by the panel and by this Court, plaintiffs motion for reconsideration is denied, and a further stay of execution of the judgment against Wisehart is also denied.

Dated: New York, New York

October 31, 2000

Richard Owen

United States District Judge

Footnotes

n1 See infra p.10.

n2 I have already found these claims to be utterly without support. See *Polin, 103 F. Supp. 2d at 254-255.*

n3 Some authorities observe that there is limited jurisdiction to say "I deny the motion." This, however, is not the

jurisdiction movant Wisehart was looking for. See *Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992); Ryan v. U.S. Lines Co., 303 F.2d 430, 433-34 (2d Cir. 1962).*

n4 Other allegations in the letter (see *Polin, 103 F. Supp. 2d at 264 n.39)* were dealt with at numerous other places in this Court's opinion of June 29, 2000.

n5 See Appendix B, pp. 34-46.

n6 See *DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997); Carte Blanche (Singapore) Pte., Ltd., 888 F.2d 260, 265 (2d Cir. 1989).*

n7 See supra p.3.

[*133] APPENDIX A

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR RECONSIDERATION, TO CORRECT AND MODIFY THE JUDGMENT, AND TO MAKE FINDINGS

Preliminary Statement

This Memorandum of Law is respectfully submitted in support of plaintiff's motion dated August 9, 2000, for an for an Order pursuant to Rule 52(b), Rule 59, Rule 60 (b)(3)(fraud and/or misconduct of adverse parties) and (6)(other reasons justifying relief from judgment), and Rule 62(b) of the Federal Rules of Civil Procedure, vacating, amending **[**20]** and adding to the findings in the final order and judgment thereon entered in this action on July 26, 2000, by granting discovery with regard to disputed fact issues presented by the pleadings herein, by setting down for trial before a jury, disputed factual issues as set forth in the Notice of Motion. Submitted with this Memorandum of Law is the affidavit of Arthur M. Wisehart sworn to August 9, 2000, and be granting a stay against execution of the judgment in the meantime.

APPENDIX B

BEFORE THE ARBITRATION TRIBUNAL
UNDER AGREEMENT DATED FEBRUARY 25, 1998
OPINION OF ARBITRATORS
Panel of Arbitrators:
Jonathan S. Liebowitz, Esquire, Chair
Kenneth D. Kleinman, Esquire, Member
Martin Freeman, Member

(p. 31) n1

VI. AWARD OF SANCTIONS AGAINST ARTHUR WISEHART, COUNSEL FOR POLIN.

In the Panel's award of February 8, 1999, the Panel assessed one-half of the cost of the arbitration, excluding witness fees, **[**21]** against counsel for Polin, Arthur Wisehart, on two grounds: misconduct in connection with litigating a frivolous age discrimination claim; unduly prolonging the hearings, unjustly accusing Kellwood and its counsel of misconduct and making a false offer of proof with respect to Paul Celona; and contempt of the Panel, based on the submission to the American Arbitration Association of false and unsubstantiated statements regarding the Panel Chair. We set forth the legal authority for these sanctions, as well as the factual bases therefore, below.

A. Legal Authority for Award of Sanctions.

Pursuant to the Agreement to Arbitrate Dispute, executed by the parties on February 25, 1998, the instant arbitration was subject both to the terms of that Agreement and to the National Rules for the Resolution of Employment Disputes of the American Arbitration Association (the "AAA Rules"). (Agreement, P 1). In the event of a conflict between the Agreement and the Rules, the Agreement would control. Id.

Under the Rules, the Panel has the authority to "grant any remedy or relief that the arbitrator deems just and **(p. 32)** equitable, including any remedy or relief that would have been **[**22]** available to the parties had the matter been heard in court." (Rule 32(c) of the AAA Rules). Moreover, the Rules expressly provide for the award of attorneys' fees: "The

arbitrator shall have the authority to provide for the reimbursement of representative's fees, in whole or in part, as part of the remedy, in accordance with applicable law." (Rule 32(d) of the AAA Rules). Accordingly, the Panel has discretion to award appropriate relief under the circumstances of this case pursuant to the AAA Rules.

[*134] As noted above, the Rules incorporate "applicable law," and permit the same remedies "had the matter been heard in court." The Agreement also contemplates that the Panel has the authority to "provide whatever remedies are currently available under law . . ." (Agreement P 7). Federal Courts generally have equitable powers to award sanctions when counsel has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." *First National Supermarkets, Inc. v. Retail, Wholesale and Chain Store Food Employees Union Local 338, 118 F.3d 892, 898 (2d Cir. 1997); Morley v. Ciba-Geigy Corp., 66 F.3d 21, 24 (2d Cir. 1995).* Rule 11 of the Federal Rules of Civil **[**23]** Procedure also provides authority to impose sanctions against parties and/or attorneys for the filing and continued pursuit of frivolous or wholly unsupported claims. Finally, the New York City Human Rights Law ("NYCHRL") permits the award of attorneys' fees and costs to the **(p. 33)** prevailing party in Polin's age discrimination suit, which was Kellwood. For all these reasons, the Panel believes that it has the legal authority to assess sanctions against Wisehart.

In addition, the Panel believes that it has an obligation to protect the forum. If the type of conduct engaged in by Wisehart were permitted to go unremedied, resort to arbitration to resolve employment discrimination and related claims would be discouraged. That is because parties know that a Federal Judge would be most unlikely to condone the kind of conduct in which Wisehart engaged; his approach to arbitration appears to have been that, since the arbitrators were not judges, "anything goes." The purpose of arbitration procedure in a case like this is to afford the parties the full protections of fairness, due process and orderly and expeditious procedure which they would expect were they in court. Thus, the benefits **[**24]** of savings in time, selection

of the decision-makers by the parties, and an enormous savings in cost over extended litigation in court, can be fully realized. If an attorney were free to disregard and flaunt the authority of the arbitral forum, those benefits would be lost: the interest of the Federal and other courts in following the national policy of promoting arbitration as a means of resolving disputes would be frustrated.

(p. 34) B. Factual Bases for Assessment of Sanctions.

1. Attorney Misconduct.

The record is replete with numerous examples of unprofessional and unethical behavior by Wisehart, including both false accusations and false representations. Any one of these examples could have been the basis for sanctions; when combined, they present a picture of an attorney who apparently believed that he was not bound by any rules of professional conduct, either toward the Panel or opposing counsel.

a. False Offer of Proof of Celona.

At the conclusion of the presentation of his case in chief on August 7, 1998, Wisehart agreed that he had presented all the witnesses he wished to present, subject to exceptions on the Panel's rulings (Tr. 1364-5). Nonetheless, **[**25]** as soon as counsel for Kellwood announced his intention to file a motion for judgment, Wisehart immediately complained that he was being treated unfairly because he wished to call Paul Celona, but did not because of the time constraints placed on him (Tr. 1392). The Panel reminded Wisehart that he had never been precluded from calling Celona in his case in chief (Tr. 729-30, 1393). Moreover, the parties had specifically agreed that the arbitration proceedings would not extend beyond 13 days of hearings, to conclude by October 30, 1998 (Tr. 236). Nonetheless, in an effort to be scrupulously fair, the Panel held a conference call on August 14th to permit Wisehart to present an **(p. 35)** offer of proof as to **[*135]** Celona and another potential witness, Sherri Polivka.

During the conference call, Wisehart represented to the Panel that Celona would testify that Harding refused to supply pants from Rutherford, and that Holding accused Harding of "sabotaging" She Knows!! (Tr. 1413-1415). Celona allegedly also would testify that Kellwood Sportswear, located in Rutherford, either would not supply samples or patterns or that such samples or patterns were incorrect (Tr. 1412). Celona would testify **[**26]** that Rutherford did not want to understand the juniors market, and he obtained no responses to his requests for information and assistance (Tr. 1412-1413). Wisehart also stated that Celona would testify that Tim November, a Rutherford scheduler, specifically told him that the goods were available, but Harding would not allow them to be shipped (Tr. 1416). According to Wisehart, Celona would also state that November told him he could not do anything about the problem because he had to live with Harding, and he was frightened of Harding because of his position. Id. The Panel accepted this offer of proof (Tr. 1468), and considered it as part of Polin's direct case.

When determining Kellwood's motion for judgment on partial findings, the Panel assumed Wisehart's representations to be accurate, which were material factors in the Panel's decision to deny Kellwood's motion with respect to the tortious interference claim. In this offer of proof, there appeared to be **(p. 36)** potential evidence of an intentional campaign by Rutherford to harm She Knows!! by providing no assistance, samples or deliveries upon request, and by its refusal to adjust to the juniors market. Consequently, **[**27]** the parties returned to New York for hearings on October 26th, 27th, and 28th to hear testimony in connection with the remaining claim.

On October 28, 1998, Celona testified, and his testimony was at significant variance from Wisehart's representations. First, Celona testified that he had no personal conversation with November, but was part of a sales group conference call, at which November simply stated that Harding determines which customer gets shipped deliveries (Tr. 1992). Celona did not testify as to any of the statements that Wisehart had represented November allegedly told Celona. Second, Celona

testified that Holding did not believe that Harding was giving She Knows!! adequate support or attention (Tr. 1984), but he made no mention of intentional "sabotage." Third, far from testifying that Rutherford gave no assistance or support, Celona testified at length that he worked with Rutherford to work out fit problems (Tr. 1971) and sample problems (Tr. 1975), and that She Knows!! was permitted, with Harding's endorsement, to hire a pattern maker, Ed Jenkins, to speed the process and provide better customer response (Tr. 1976, 2012). He also testified that it was She Knows!!'s **[**28]** decision to sell a far more extensive line than simply the loafer pant, which was beyond Rutherford's ability, **(p. 37)** was not consistent with the original business plan outlined in July, 1991, and which required import sourcing (Tr. 1977, 2006-2007). It was also She Knows!!'s decision to try to produce a line for late fall, 1991, which led to production problems (Tr. 2006). Finally, and significantly, Celona testified that Harding's decisions to ship one customer rather than another was simply a "senior management decision" to obtain the best "impact" of the available resources (Tr. 2022). Celona's testimony, then, presented the opposite picture than had been described by Wisehart. Rather than intentional sabotage and refusals to assist, there were substantial efforts by Rutherford to work with She Knows!! and difficult management decisions to allocate resources. Rather than showing the destruction of She Knows!! by actions of Harding, Celona testified that She Knows!! sowed its own seeds of destruction, by changing the business plan to seek earlier deliveries of far **[*136]** more extensive lines. Had Celona's testimony been represented accurately by Wisehart, there would have been **[**29]** a substantial possibility that the tortious interference claim might have been dismissed, thus obviating the need for three additional days of hearing. Wisehart's false representations in this regard misled the Panel, were a serious breach of **(p. 38)** professional responsibility, and may well have led to significant increased expense to Kellwood. n2

b. False Accusations and Other Improper Conduct.

Aside from Wisehart's accusations against the Panel Chair, which will be set forth below, he repeatedly and without any factual foundation, falsely accused Kellwood and its counsel on inappropriate and unethical behavior, in an attempt to **[**30]** persuade the Panel to treat him or his client more favorably. On three different occasions, Wisehart accused Wall of improperly contacting non-party witnesses and demanded Wall's notes of his conversations. During the testimony of Barry Gussoff, Wisehart alleged that Wall and/or Kellwood "put the heat on" Alan Ziskin, to pressure him not to testify (4/1/98 Gussoff Tr. 37-41). Wisehart complained that Wall somehow "interfered" with Gussoff as well, by calling him to ask questions about the case (*Id. at 37)*. During the testimony of Jeffrey Levy, Wisehart accused Wall of interfering with his testimony by telephoning him (4/3/98 Levy Tr. at 63-66). Wisehart also falsely stated in a letter dated August 19, 1998, that Wall contacted Celona on numerous occasions, that Celona objected to these calls and that Celona **(p. 39)** refused to speak to Wall without Wisehart's presence. Wall stated on the record that he simply left a voicemail for Celona on a single occasion (Sanctions Tr. at 54).

Each of these accusations, apparently designed to intimidate Kellwood and/or influence the Panel, were [sic] either false or not the basis for any allegation of improper conduct by **[**31]** Wall. There was no prohibition against Wall contacting a non-party, non-expert potential witness in order to prepare for the hearings. Wisehart's suggestions to the contrary were wholly inappropriate.

Wisehart also accused Kellwood of destroying evidence and maintaining false financial records. He stated that the She Knows!! balance sheets were "obviously manufactured document[s]." (Tr. 436). He provided no support for this serious allegation. Wisehart also alleged that Kellwood deliberately destroyed evidence, i.e., several bolts of cloth and product samples, which indeed were not relevant to the case, and were disposed of after unrelated litigation was settled (9/18/98 Conf. Tr. 16).

In an astounding display of improper conduct, Wisehart had a court reporter tape and transcribe a telephone conference on May 28, 1998 with Panel Chair Liebowitz and Wall, without either party's permission or without even informing the other parties to the conversation of his actions. Such behavior was not only unethical, it would be considered illegal in may states.

(p. 40) c. Undue Prolonging of Hearings.

There were ten and one half days of testimony in this case, nine of which **[**32]** were devoted to Polin's case in chief or his rebuttal. The incredibly time-consuming nature of this proceeding was due in large part to Wisehart's prosecution of the case. In addition to the constant repetition of questions and reiteration of the same areas of inquiry, Wisehart continuously interposed spurious objections and utilized other tactics that unduly prolonged the proceedings. **[*137]** Included among these actions were:

(i) Objecting during Wall's opening statement that Wall should not be permitted to utilize a demonstrative time line exhibit (4/1/98 Holding Tr. 36-37);

(ii) Seeking to have Mrs. Polin's physician testify as to the impact of Mrs. Polin's health on Polin's business venture, despite the failure to disclose such testimony in Polin's Pretrial Memorandum (4/1/98 Gussoff Tr. 27-38);

(iii) Serving pleadings on Saturday morning before a Monday hearing date to require the use of a different court reporter, and bringing his own court reporter to the hearing without authorization (Tr. 5, 10);

(iv) Seeking to have his expert, James Leonard, testify during Polin's case in chief as to the profit and loss statements of Kellwood, after having identified Leonard **(p. 41)** as **[**33]** an expert only as to Polin's lost earnings (Tr. 190-193, 443-444);

(v) Agreeing to a time limitation as to the length of hearings, and then asserting that such an agreement was forced upon him (Tr. 1386, 1392, 1395; 9/18/98 Conf. Tr. 32-33);

(vi) Continuously leading his own witnesses on direct examination, to the point where he appeared to be

intentionally ignoring the repeated admonitions of the Panel, which finally had to preclude any follow-up questions to a leading question (Tr. 342, 1883-1886, 1889-1890, 1893, 1910, 1916, 1920, 1926-27, 1938, 1939, 1969);

(vii) Providing repetitious questioning and seeking duplicative testimony despite Panel rulings to cease (Tr. 1665, 1685-86, 1708-1709, 1715);

(viii) Seeking to have Kellwood pay for expedited transcripts, rather than normal delivery, and continuing in his demand after the Panel had ruled (8/14/98 Conf. Tr. 1470-1476; (p. 41 cont'd.) 10/21/98 Conf. Tr. 4-17);

(ix) Subpoenaing Celona as a witness in Polin's case in chief after Wisehart had already rested and the Panel had accepted his offer of proof (9/18/98 Conf. Tr. 4-31); and

(x) Submitting a dispute to the American Arbitration Association when the arbitration was by **[**34]** private agreement and the Association had no jurisdiction over the **(p. 42)** matter. Wisehart was fully aware of such lack of jurisdiction (10/21/98 Conf. Tr. 39).

All of these actions delayed the hearings and caused additional expense to Kellwood. They constituted unprofessional behavior and serve as a basis for sanctions against Wisehart.

d. Frivolous Age Discrimination Claim.

The Panel has set forth above its discussion as to the merits of Polin's age-discrimination claim. Suffice it to say that there was absolutely no basis for litigating an age discrimination claim by a plaintiff hired at age 43 and terminated two years later, with not an iota of evidence that a similarly situated younger employee was treated preferentially to Polin. Given the years of discovery and the length of the proceedings in this matter, it was unreasonable that Wisehart would continue to pursue this claim in the absence of any evidentiary support. This is a clear case for Rule 11 sanctions, as well as the award of attorney's fees to Kellwood as the prevailing parting under the NYCHRL. See NYCHRL Section 8-502(f). The award is necessary to demonstrate that frivolous claims brought, it appears, **[**35]** primarily to force a settlement may not be countenanced.

2. Contempt of the Panel.

The Panel also assessed fees and expenses against Wisehart because of his submission to the American Arbitration Association ("AAA") of written, false and unsubstantiated **(p. 43)** statements concerning the Panel Chair, by letter dated **[*138]** October 23, 1998 (the "AAA Letter"). Arbitrators' Exhibit A, copy attached. In the AAA letter, Wisehart made the following accusations:

1. Panel Chair Liebowitz threatened to abandon the case and would decline to decide the dispute unless Wisehart agreed that he received a fair hearing;

2. Panel Chair Liebowitz had demonstrated that he was no longer "neutral" but a partisan, based on a telephonic hearing on October 21, 1998;

3. Panel Chair Liebowitz improperly received payments from Defendants, and threatened to desist from participation if timely payment were [sic] not received;

4. Panel Chair Liebowitz was unfair to Polin because he would not order daily transcripts of the proceedings;

5. Panel Chair Liebowitz's rulings were influenced by Kellwood's ability to withhold and delay payment;

6. Panel Chair Liebowitz would not agree to an extension of the **[**36]** proceedings because of concern of payment by Kellwood.

The AAA Letter was hand-delivered to the AAA on Friday, October 23rd, and received by Wall and the Panel on Saturday, October 24th. At the commencement of the proceedings on Monday, October 26th, the Panel advised Wisehart that it intended to hold a hearing on sanctions with respect to the AAA Letter, at the **(p. 44)** conclusion of the testimony (Tr. 1531-2). When the testimony concluded on Wednesday, October 28th, Wisehart objected to proceeding with the sanctions hearing, because his personal counsel wanted several weeks to prepare (Sanctions Tr. 6). Out of courtesy to Wisehart and his counsel, the proceedings were postponed until the following day.

On Thursday, October 29, 1998, the Panel afforded Wisehart the opportunity to explain the factual basis underlying the serious allegations contained in the letter to the AAA. He

declined to do so (Sanctions Tr. 30-31, 62). After hearing argument from Wall and Wisehart's attorney, the hearing was closed.

Based on the Panel's review of the record and its recollection of the events at issue, the Panel finds the AAA Letter to contain outright falsehoods and to be a serious breach **[**37]** of professional ethics. Wisehart essentially accused Panel Chair Liebowitz of being improperly and unethically influenced by Kellwood's payment of fees. This is a direct attack on the Panel Chair's character and integrity, submitted to the institution which, in large part, controls his livelihood as a full-time arbitrator. Wisehart had no basis for making these statements, which were essentially designed to oust the Panel Chair from the proceedings, apparently because Wisehart believed that the Chair was not looking favorably upon his claims. At the time the letter was submitted, two of Polin's three claims had been **(p. 45)** dismissed. Had Panel Chair Liebowitz recused himself, Wisehart might have had the opportunity to retry the entire case, at substantial expense and to the detriment of Kellwood. To besmirch the good name of a highly respected arbitrator, without any factual foundation, simply for potential tactical advantage, was unconscionable.

The allegations of the letter were clearly false and known by Wisehart to be false. Panel Chair Liebowitz never stated that he would resign unless Wisehart agreed he received a fair hearing, nor did he threaten to resign if he did **[**38]** not receive payment. At no time did Panel Chair Liebowitz provide any basis for an assertion that he was influenced by Kellwood's payment of fees; to the contrary, both of the other Panel members, including the member selected by Wisehart, agreed that Panel Chair Liebowitz had been impartial, and according to member Freeman, had attempted to give Polin every opportunity to present his case (Sanctions Tr. 78-81). The only reason Panel Chair Liebowitz was paid by Kellwood, rather than by both Polin and **[*139]** Kellwood, is that Wisehart insisted on such an arrangement as a condition to agree to arbitration (Agreement P 8.2). Moreover, all decisions of the Panel were made by consensus, including

the decision with respect to daily transcripts. The conference call on October 21, 1998 related to Wisehart's subpoenas of witnesses and documents as well as his request for daily transcripts, and there was no evidence during that call of any improper behavior by the Panel **(p. 46)** Chair. Finally, as noted above, the time limitations on the hearings were specifically agreed to by Wisehart and Panel Chair Liebowitz was merely honoring the agreement of the parties in declining to permit the proceedings **[**39]** to last beyond October 30, 1998.

For the foregoing reasons, the Panel finds that Wisehart's actions constituted misconduct, were in bad faith, vexatious and in contempt of the Panel. Accordingly sanctions were assessed against him in the amount of one-half the fees and expenses, excluding witness fees, incurred by Kellwood.

Dated: April 10, 1999

S/

Jonathan S. Liebowitz, Esquire

Chair

S/

Kenneth D. Kleinman, Esquire

Member

S/

Martin Freeman

Member

Member, Freeman submits the following dissent as to the fraudulent inducement claim:

Footnotes

n1 Page numbers in bold are the page numbers of the panel's forty-six page opinion.

n2 Indeed, Wisehart also misrepresented the testimony of Polivka, although this had no impact on the Panel's decision, because the Panel rejected his offer of proof as to her. Nonetheless, her testimony, as shown by the Panel's discussion of the tortious interference claim, demonstrate[s] the lack of merit of that claim, rather than being supportive of Polin's position.

93 Civ. 7876 (RO)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES S. POLIN, Plaintiff,

v

KELLWOOD COMPANY, KELLWOOD SPORTSWEAR, ENOCH HARDING, JR., and HARRY HOLDING, Defendants.

June 29, 2000, Decided

June 30, 2000, Filed

COUNSEL:
Arthur M. Wisehart, WISEHART & KOCH.

Steven R. Wall, MORGAN, LEWIS & BOCKIUS LLP.

JUDGES:
Richard Owen, United States District Judge.

OPINIONBY:
Richard Owen

OPINION:

[*241] OPINION AND ORDER

OWEN, District Judge

Plaintiff Charles S. Polin, the former president of She Knows!!, a division of defendant Kellwood Company, commenced this litigation in this Court in 1993, alleging that he was fraudulently induced by Kellwood to accept employment; that defendants Harding, head of Kellwood Sportswear, and Kellwood Sportswear itself, tortiously and negatively interfered with his employment relationship with Kellwood; and that Kellwood then terminated his employment in an act of wrongful age discrimination. After four years of pre-trial litigation and numerous rancorous discovery disputes, n1 the parties began discussing arbitration as a means to settle the controversy, and on September 27, 1997, Polin's counsel, Arthur Wisehart, wrote to Kellwood's counsel, Steven Wall, giving him the name of Jonathon Liebowitz as an arbitrator. [**2] By January 15, 1998, both sides had designated Liebowitz as the neutral arbitrator, and Liebowitz that day wrote both Wisehart and Wall accepting and confirming with them a per diem fee rate for his service of $ 2000 per day. n2 Two partisan arbitrators had already been chosen: Kenneth Kleinman, by Kellwood, and Martin Freeman, by Polin. Thereafter, [*242] on February 25, 1998, the parties in a by-then written Arbitration Agreement confirmed that it was in their "mutual best interest to submit to final and binding arbitration all the claims brought by Polin." n3 The agreement specified that the arbitration was to be "subject to the National Rules for the Resolution of Employment Disputes of the American Arbitration Association, . . . and the terms and conditions of this Agreement." n4 It provided that in the event of a conflict between the AAA rules and the arbitration agreement, the agreement would control, and that on review of any arbitration award the Federal Arbitration Act, 9 U.S.C. § § 10 and 11, should apply. The agreement further provided 1) that "the arbitration panel shall have the authority to provide whatever remedies are currently available under law for the [**3] claims asserted by Polin in the action captioned Polin v. Kellwood Company et al., 103 F. Supp. 2d 238, 2000 U.S. Dist. LEXIS 9010 (2000), as part of its final and binding arbitration award[s]," 2) that (the AAA rules applying) the

"arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Section 36, 37, and 38 in favor of any party[,]" 3) that "the arbitrator shall have the authority to provide for the reimbursement of representative's fees, in whole or in part, as part of the remedy, in accordance with applicable law," and 4) that under AAA rules "All expenses of the arbitration . . . shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator directs otherwise in the award." (emphasis added). Here, Polin and Kellwood did agree "otherwise", to wit, that Polin would pay for Martin Freeman, the arbitrator selected by him, and Kellwood would pay not only the administrative costs of the arbitration and the full costs of [**4] the arbitrator it selected, Kleinman, but also the full costs of the neutral arbitrator, Liebowitz, that Wisehart had proposed. Also, here, "the arbitrator[s] [did] direct[] otherwise in the award." See infra pp. 3, 12-14. Further, they agreed "that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction," which included this Court. This action in this Court was then placed on the suspense calender.

The arbitration proceedings were held in New York City and began with opening statements on April 1, 1998, and continued April 2 and 3, Wisehart presenting evidence on behalf of Polin. The proceedings were then adjourned to June 1. On May 22, however, apparently in response to Kellwood's opening statement that She Knows!! lost eight million dollars, Polin, by subpoena to Kellwood, demanded the production of a large volume of financial documents. Kellwood moved to quash the subpoena contending that it was not permitted by the arbitration agreement which precluded any further discovery under the circumstances, that Polin had already been provided with over 5000 pages of financial records, and that compliance with Polin's new demand "would take

weeks, if not months, to gather such documents, and a tractor-trailer to deliver such documents." Later on the day that Kellwood submitted its motion, Wisehart, wishing to have a hearing and ruling on the motion, telephoned neutral [**6] arbitrator Liebowitz and Steven Wall, Kellwood's attorney. Unknown to them, Wisehart had a reporter at his end taking the conversation down. Liebowitz refused to rule on the motion because he had not read the papers and [*243] asserted that two arbitrators were necessary to make a ruling. While still on the phone, however, Liebowitz complained that his April 6 invoice had not been paid by Kellwood (the party) as Wisehart and Wall had agreed. n5 He specifically reminded [*244] Wisehart and Wall in apologetic terms that he had the authority under the AAA rules to suspend the proceeding until he was paid, though he did not wish to do that. At the end of the conversation, somehow Liebowitz sensed that Wisehart was recording it, n6 and upon being told that it was so, Liebowitz informed Wisehart that the recording was unauthorized and would be rejected if offered as part of the arbitration record. The transcript, as it turns out, however, is instructive here. Sometime later, the panel granted Kellwood's motion to quash.

In any event, in order to avoid Liebowitz effecting a delay of the proceedings, which Wisehart had specifically stated he did not want since it would cause him "substantial injury", see supra note 5, on June 1, Kellwood's law firm forthwith paid Liebowitz' April 6 invoice, aware [**8] some "glitch" had delayed Kellwood Company processing the invoice. Wisehart continued Polin's direct case that day and the next, at which time the proceedings were adjourned to August 5. Liebowitz then submitted another bill to Kellwood on June 10, and again, in order to avoid delay, Kellwood's law firm paid that bill on June 24.

The proceedings resumed on August 5 with Wisehart continuing Polin's direct case for three days through August

7, at which time Wisehart rested Polin's direct case. The record then reads:

ARBITRATOR LIEBOWITZ: Plaintiff rests.

Mr. Wisehart, have you presented all witnesses and documentary evidence, who or that, in your professional judgment, should have been presented on behalf of your client, Mr. Polin, on your direct case?

MR. WISEHART: Yes, subject to my specific - - subject to certain exceptions I've noted as to evidence that was not made available.

ARBITRATOR LIEBOWITZ: I don't understand that answer. What evidence?

MR. WISEHART: The rulings that we couldn't produce.

ARBITRATOR LIEBOWITZ: Except for rulings of the panel, the other side [*245] was heard and we made rulings. Your answer is yes?

MR. WISEHART: Except for those rulings that we took exception [**9] to.

ARBITRATOR LIEBOWITZ: There's always exceptions to rulings and to adverse rulings. Other than that, you've put your case in and had your chance; right? That's all we want to know.

MR. WISEHART: Right.

(Tr. of Aug. 7, 1998 at 1364-65).

Thereupon, Wall stated he was going to move to dismiss all the claims, asserting insufficient evidence to sustain them. Wisehart immediately complained that he was being treated unfairly because he was going to call two more witnesses, Sherri Polivka and Paul Celona but couldn't. The panel reminded Wisehart that he could have called Celona as part of his direct case had he chosen to, but to give Wisehart every opportunity to present Polin's case, the panel scheduled a telephone conference for August 14, a week

later, so Wisehart could present an offer of proof as to Celona and Polivka, Polin's alleged successor at She Knows!!.

At that telephone conference, (as the panel later recited in its opinion of April 10, 1999, at 35), Wisehart represented that Celona would testify that Enoch Harding, president of Kellwood Sportswear, located in Rutherford, refused to or incorrectly supplied pants, samples, or patterns. Wisehart also represented [**10] that Celona would testify that Kellwood Sportswear did not understand the juniors market which She Knows!! was in and was unwilling to understand that market. He represented Celona would testify that Harry Holding, Kellwood's vice president of marketing, accused Harding of "sabotaging" She Knows!!, and that Tim November, a Kellwood Sportswear scheduler, told Celona he could not ship available goods to She Knows!! because Harding had prohibited him and he was fearful of Harding. The panel, accepting Wisehart's representations, agreed to hear Celona, but it rejected the offer of proof as to Polivka.

With this before it, on October 14, 1998, the panel granted Kellwood's motion for judgment on the fraudulent inducement and age discrimination claims (arbitrator Freeman dissenting) but, based essentially on Wisehart's offer of proof as to Celona, the panel denied the motion to dismiss Polin's claim that Harding and Kellwood Sportswear tortiously interfered with Polin's employment relation with defendant Kellwood Company and required Kellwood to go forward with its proof on this issue.

But before this could happen, the panel and the parties participated in a subsequent telephonic conference [**11] because Wisehart requested the arbitrators sign subpoenas for four witnesses for Polin's rebuttal case, Mr. Joseph, Sherri Polivka, Gary Jastrow, and D.L. Thompson. The panel, concerned that the testimony would be repetitious of Polin's direct case and perhaps not relevant to any issue yet to be raised by Kellwood's defense, decided to allow Kellwood to put on its case before signing the subpoenas. n7

Two days after the panel declined to sign these subpoenas and three days before Kellwood was to put on its defense, Wisehart, on October 23, a Friday, wrote and delivered a letter to the American Arbitration Association making a number of factual allegations, viz.: that some three months earlier, on August 7, 1998, in an off-the-record discussion, Liebowitz "stated that if counsel for Polin states that he has not received a fair hearing, he [Liebowitz] will abandon the case and will decline to decide the dispute to be arbitrated," (Letter from Wisehart to the AAA of Oct. 23, 1998, at 2-3), that "the defendants have been making payments directly to the neutral arbitrator [Liebowitz], by-passing the American Arbitration Association, a procedure that is objectionable," n8 (id. at 4), and that "the neutral arbitrator's ruling on this [refusal to require Kellwood to provide daily transcripts] and other procedural matters is believed to be influenced by Kellwood's ability to withhold or delay payments to the neutral arbitrator if Kellwood disagrees with his rulings," (id. at 5). Wisehart closed his letter by asserting:

22. However, it is clear that defendants would withhold [**13] any further payments to the neutral arbitrator as a means of coercing him into desisting from granting such additional time necessary to complete the arbitration. n9

23. Such a tactic is contrary to the National Rules and the Due Process Protocol, under which it provided that the arbitrator may postpone hearings for good cause shown as provided in paragraph 17, and the further provision that if there is a vacancy, the American Arbitration Association may fill the vacancy in accordance with the applicable provision of the National Rules so that the award can be rendered, as provided in paragraph 13.

(Id. at 6) (emphasis added). One notes, again, that the AAA, the recipient of this letter, had not at any time played any part or role in this case except for the incorporation of its rules in the parties agreement.

Kellwood and the arbitrators were not furnished copies of Wisehart's AAA letter until the next day, Saturday, October 24. The hearings went forward the following Monday starting with Kellwood's defense to the surviving tortious interference claim, as well as Polin's rebuttal case and Kellwood's surrebuttal case, running for two and a half more days, Celona being the last witness closing the proof-taking on Wednesday morning, October 28. But before the hearings had resumed the prior Monday, October 26, Wisehart was told by the panel he would be given an opportunity after the close of proof to tell them the basis for his letter to the AAA.

Wisehart was given the promised opportunity Wednesday afternoon, October 28. However, [**15] as an accommodation to Wisehart, the panel agreed to postpone the hearing until the following day to allow Wisehart's attorney time to prepare. See infra pp. 30-31 and note 40. Since Wisehart's letter attacked Liebowitz' reputation, the panel decided to have arbitrator Kleinman preside over the said hearing. The next day, arbitrator Kleinman stated the panel's purpose:

ARBITRATOR KLEINMAN: The purpose here is this letter of October 23, 1998, [Wisehart's AAA letter] among other things, constituted a direct attack [*247] on the integrity of the Panel and specifically Arbitrator Liebowitz, a direct attack. And that attack is based upon beliefs, according to the letter. We don't know where those beliefs came from, because it's certainly not in the record as far as an attack, why his integrity, why there should be a challenge to the fact that Arbitrator Liebowitz would rule a certain way on procedural or substantive issues because of an alleged concern that he wouldn't get paid.

That is as serious an accusation that can be made against an Arbitrator or a judge, for that matter. It can't be any more serious than that. That is Mr. Liebowitz's livelihood, which is in part controlled [**16] by the American Arbitration

Association. These are extremely serious allegations Mr. Wisehart has leveled against him.

It is our intent to ask him n10 why he leveled those accusations and the basis for those accusations, because we don't know what the basis of that is. To us, upon reviewing the record, we don't believe there is a basis for that.

I propose to proceed to ask him [Wisehart] questions. If he decides to refuse to answer questions, then we'll put that on the record and there is nothing else we can do. We can't force him to open his mouth. That's up to you and Mr. Wisehart.

(Tr. of Oct. 29, 1998, at 35-37). Refusing to support his any of his allegations, Wisehart stated he would not answer any questions, "On constitutional grounds as well as jurisdictional grounds." (Id. at 62).

Some three months later, on February 8, 1999, the panel [**17] issued a brief ruling on the merits in which it found in favor of Kellwood on the remaining tortious interference claim which had survived only because of Wisehart's unfulfilled representations as to Celona's prospective testimony, whom the panel had by then heard and as to whom they later wrote: "Celona's testimony, then, presented the opposite picture than had been discussed by Wisehart. . . . Wisehart's false representations in this regard misled the panel. . ." (Arbitrators' Opinion of Apr. 10, 1999, at 37). See infra pp. 13-14. The panel unanimously sanctioned Wisehart for his misconduct and contempt of the panel and awarded Kellwood one-half of the arbitration costs to be paid by Wisehart personally. By cover letter attached to this ruling, the panel indicated that an full written opinion would be issued on or before April 12, 1999. In response to this ruling, Polin, on February 25, 1999, filed a petition to vacate the award, for a stay and for other relief.

On April 10, 1999, the panel issued an extensive, detailed forty-six page opinion signed by all three arbitrators, and a six page dissent by Freeman solely on the fraudulent inducement issue. Unlike the October 14, 1998 ruling [**18] on Kellwood's motion for judgment in which Freeman dissented both to the dismissal of the age discrimination claim and the fraud in the inducement claim, Freeman in this final opinion dissented only to the dismissal of the fraud in the inducement claim, agreeing with his colleagues to dismiss the age discrimination claim. The April 10 opinion details the panel's reasoning for it unanimously dismissing the age discrimination and tortious inference claims, and unanimously sanctioning Wisehart while finding 2-1 in favor of Kellwood on the fraudulent inducement claim.

As to the panel's determinations on the merits, while dealing with the law hereafter and innumerable collateral issues, I observe at the outset that there is no legal or factual basis whatever to put the panel's findings or conclusions in any question were there not a plethora of alleged collateral issues raised by Polin and Wisehart, and it is as to those that the vast bulk of [*248] this opinion hereafter is required to address.

Thus, as to the age discrimination claim, the panel found, "There was no evidence to support it", (id. at 25); that it was "frivolous", (id.); not "even a colorable claim", (id. at 25-26), [**19] because Polin presented no evidence to support his claim other than he was within the protected age group when hired. n11 The panel found that:

aside from Polin's beliefs that Sherri Polivka of Kellwood is 'youthful looking,' [that] Polin should have remained at Kellwood, and that he rather than Polivka should have headed up a continued She Knows!! operation, a claim which conflicts with the evidence of Polin's own part in bringing about the demise of She Knows!!, partly contained in the testimony of Polivka n12 herself, there is simply no ground for a claim of age discrimination.

(Id. at 26).

During the arbitration, Polin had proceeded on a theory of disparate treatment age discrimination. Polin presented no evidence that he was qualified for the position or "that Kellwood's failure to retain him was motivated by age discrimination." The panel found that Polin, though an expert salesman, took on responsibilities as president of She Knows!! which were beyond his capabilities. Additionally, the panel found that Polin's supposed replacement, Polivka, was forty years old and within the same protected age group and that individuals other than Polin had been terminated or retired from Kellwood after their divisions lost money.

As to Polin's tortious interference claim, which was based on his assertion that Harding had intentionally undermined or "sabotaged" Polin's division, this essentially was to come from the testimony of Paul Celona that Wisehart had earlier told the panel would so testify - - but Celona, when before them did not, see infra pp. 13-14, and the panel therefore found this claim "not proved."

With regard to the sanctioning of Wisehart personally for misconduct, the panel based its authority to make this determination and so act on the agreement, the AAA [**21] rules, and the applicable law. The panel cited the agreement which incorporates the AAA rules including rule 32 (c) and (d), authorizing, respectively, any remedy available had the matter been heard in court and attorney's fees as a remedy in accordance with applicable law. The panel then observed that since federal courts "have equitable power to award sanctions when counsel has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons,' First National Supermarkets, Inc. v. Retail, Wholesale and Chain Food Employees Union Local 338, 118 F.3d 892, 898 (2d Cir. 1997)," and since Rule 11 of the Federal Rules of Civil Procedure provides authority to sanction parties or attorneys for filling and continuing a frivolous claim, so, too, does the panel

because it had been given the authority under AAA rule 32(c) to fashion any remedy a court would have the power to fashion. Moreover, the New York City Human Rights Law permits an award of attorney's fees and costs to the prevailing party in an age discrimination claim, n13 and the panel also based its award on that as well. (Arbitrators' Opinion of Apr. 10, 1999, at 31-33).

As to the factual basis for the sanctioning of Wisehart, the panel found that Wisehart had made "false representations" with regard to what Paul Celona would [*249] testify to. (Id. at 34). They found that Celona's testimony n14 was "at significant variance from Wisehart's representations." (Id. at 36). They stated:

Celona's testimony, then, presented the opposite picture than had been described by Wisehart. Rather than intentional sabotage and refusals to assist, there were substantial efforts by Rutherford to work with She Knows!! and difficult management decisions to allocate resources. Rather than showing the destruction of She Knows!! by the actions of Harding, Celona testified that She Knows!! sowed its own seeds of destruction, by changing the business plan to seek earlier deliveries of far more extensive lines. Had Celona's testimony been represented accurately by Wisehart, there would have been substantial possibility that the tortious interference claim might have been dismissed, thus obviating the need for three additional days of hearing. Wisehart's false representations in this regard misled the Panel, were a serious breach of professional responsibility, and [**23] may well have led to significant increased expense to Kellwood.

(Id. at 37).

It appears that Wisehart misrepresented the testimony not only of Celona but also of Polivka. However, that misrepresentation had no impact on any panel decision

because the panel had rejected that offer of proof. In its opinion, the panel also found that Wisehart 1) falsely accused Kellwood and its counsel of interfering with witnesses testimony, of maintaining false financial documents, and of destroying evidence; 2) improperly transcribed a telephone conference with Liebowitz and Kellwood's counsel without telling either party; 3) unduly prolonged the hearings by a constant repetition of questions, a reiteration of the same areas of inquiry, and by continuously interposing spurious objections; 4) pursued a frivolous age discrimination claim; and 5) committed a contempt of the panel by sending a letter to the AAA before the proceedings had terminated containing false and unsubstantiated statements about arbitrator Liebowitz, which it considered to be a serious breach of professional ethics. (Id. at 34-46). For all of the reasons listed, the panel sanctioned Wisehart in the amount of one-half Kellwood's arbitration fees and expenses, excluding witness fees, which one-half totaled [**25] $ 153,237.64. Accordingly, the panel's determination on the merits, all having ample support in the record, may not be rejected.

[*250] Thereafter, following the April 10 panel opinion, on May 10, 1999, I ordered the postponement of any further proceedings on the motion to vacate "until after the Arbitration Panel issues its decision regarding the fees and costs awarded to Kellwood." Thereafter, the arbitration panel issued three unanimous rulings, two on June 23, and one on October 20. The panel in its June 23 rulings, which were based on an affidavit from one of Kellwood's attorneys, determined Kellwood's fees and expenses and directed Wisehart to pay half of Kellwood's fees and expenses to that point, that one half being $ 145,452.68. The panel also granted Kellwood leave to submit additional documentation supporting a further award for final costs upon receipt of all the final billing statements from the two arbitrators and gave Polin fifteen days thereafter to respond. After such submissions, the panel said it would "render a Second Supplemental Award finally determining the issues of amount of costs of this arbitration as defined in its Award of

February 8, 1999, in addition to the [**26] costs awarded herein." (Arbitrators' Award of June 23, 1999, P3).

In response to the panel's June 23 decision, Polin submitted motion papers on August 11 for leave to supplement and amend the petition dated February 25. To these papers were appended copies of two internal memoranda which Polin's arbitrator Freeman had sent to the other arbitrators dated June 5, 1999, and July 3, 1999, and as to which Wisehart and his paralegal Joan Lipin had made numerous phone calls to Freemen ultimately persuading him to send them. n15 While Freeman had used the word "dissent" in captioning these internal memoranda, they were not dissents in the legal sense, nor did Freeman so intend them. See infra note 16. Wisehart, nevertheless, in submitting these to the Court characterized these statements as Freeman's "dissents" and proceeded to make numerous arguments to vacate the award based on these memoranda. As observed earlier, see supra pp. 7-8, 11, Freeman had actually "dissented" to the panel's October 14, 1998 brief ruling, on the dismissal of Polin's age discrimination claim and fraudulent inducement claim, and had dissented to the panel's April 10, 1999 opinion, but this time only [**27] on the fraudulent inducement issue, concurring on all the rest. But Wisehart, now having submitted these two internal memoranda as additional "dissents", argued that these "four dissents" were sufficient to vacate the award because they allegedly exposed extensive and improper ex parte conversations between Kleinman, Kellwood's chosen arbitrator, and Wall, Kellwood's counsel. However, only the June 5 and July 3 "memoranda/dissents" refer to ex parte conversations. Both were written before Freeman signed the two supplemental panel rulings dated June 23, 1999. By not attaching these to the supplemental rulings, Freeman obviously regarded them as having no effect as to any part of the award.

Thereupon, responding to Wisehart's said representation to the Court as to these statements being Freeman's "dissents", Kellwood put before me Freeman's subsequently written highly apologetic memorandum, dated August 19, 1999, in which Freeman [**28] noted that a lot of things had been "clarified" since the June 5 and July 3 statements, i.e., "dissents", and explained that he never intended the June 5 and July 3 statements to be "dissents," that those statements were "an internal matter between the arbitrators," and that he had told Joan Lipin, Wisehart's paralegal, they could not use the statements. See infra note 16. Freeman also explained that the telephone conversations, as to which he had complained to his colleagues in those earlier statements, had been explained by Kleinman to his "complete satisfaction," and given that, on July 16, 1999, he signed the June 23 panel ruling without dissent. n16

Because Wisehart knew that Freeman had repudiated the supposed "dissents," [*252] but Wisehart had used them anyway, Kellwood contends that Wisehart, with the assistance of his paralegal Lipin, was attempting to create a completely false picture of events and was engaging in and continuing a pattern and practice of deception on this Court. As support for this, Kellwood called my attention to an incident in 1991 which had engaged the extensive attention of five state courts and two federal courts, in which Lipin, then Wisehart's client and paralegal (and Lipin being his paralegal on this case as well) were the subject of state court proceedings culminating in findings that Lipin had secretly and deliberately taken n17 and kept and copied an extensive adversary's file containing, among other things, privileged attorney work product, during a lawyers' conference with a Special Referee on her case, n18 and that Wisehart, knowing how she had obtained the documents, when confronted, "refused to divulge how Lipin had obtained the documents, asserting only that she had done so legitimately," Lipin v. American Nat'l Red Cross, 1996 U.S. Dist. LEXIS 396, Nos. 93 Civ. 1334, 92 Civ. 4455, 1996 WL 18901 (S.D.N.Y. Jan. 17

1996), [**30] aff'd, 113 F.3d 1229 (2d Cir. 1997), cert. denied, 522 U.S. 1047 (1998), and that Wisehart then endeavored to use the documents to force a "substantial" money settlement. Portions of the opinion of Chief Judge Kaye of the New York Court of Appeals are but one of the illuminating recitals of this incident.

On Friday, June 28, 1991, during the course of increasingly acrimonious pretrial proceedings marked by mutual accusation of abusive tactics, plaintiff [Joan Lipin] and Wisehart appeared at a hearing room in New York County Supreme Court to argue certain deposition issues before a Special Referee. Now employed as a salaried paralegal by her attorney, plaintiff took what she described as her customary place at the conference table. Already on the table at that spot was a stack of some 200 pages, the top sheet beginning:

"Weil, Gotshal & Manges

memorandum

December 8, 1989

To: File

From: Lawrence J. Baer

Re: Joan Lipin v American Red Cross * * *

Meeting with Mary Stanton 9/15/89".

The page continued with a summary of counsel's meeting with Stanton, a Red Cross employee, including Stanton's candid impressions of plaintiff and her [**31] recounting of Jacoby's legal advice regarding plaintiff's termination.

While the attorneys- including the author of the file memorandum, WGM associate Lawrence Baer- were absorbed in heated exchanges regarding the deposition, plaintiff read the first few pages, then shifted the documents (which she concealed in a folder) to her lap and continued to read, undetected for more than an hour. In plaintiff's own words: "I wasn't reviewing those papers, I was reading them." Immediately, she recognized the document as containing the

lawyer's interview notes of Red Cross personnel, including defendant Bender, as well as deposition digests.

[*253] At the break, plaintiff slipped the documents into a Redweld file "for [her] own protection," determined to retain them as "material evidence," and in the corridor told Wisehart about the documents and what she had done. Wisehart said that he would not himself read the documents until he had received a "second opinion." Plaintiff told Wisehart that she would not give him the documents unless she could keep a copy. During the luncheon recess plaintiff returned to Wisehart's office where she made three photocopies, "Bates-stamped" them, and- except for [**32] one copy she later took home with her- placed the documents in a locked filing cabinet to which she had a key.

According to plaintiff, Wisehart counseled her that if Baer discovered his documents missing, she must tell the truth: that she had picked them up by mistake. Plaintiff responded that she had not picked them up by mistake, but deliberately, n19 and would not return the originals unless asked to do so by WGM. In consultation with the lawyer who had referred plaintiff's case to him, Wisehart concluded that any claim of privilege as to the documents had been lost as a result of Baer's careless handling of them, and on Sunday evening, June 30, he read through them.

Promptly the next morning, Wisehart wrote to Jacoby that "a recent development causes me to suggest that immediate attention should be given to the subject of settlement from all points of view." At a meeting the following afternoon, Wisehart confronted defense counsel with the documents and demanded the immediate termination of defendant Bender, a "substantial" monetary settlement and other reparations. When Jacoby asked how he had obtained the documents, Wisehart demurred, citing attorney-client privilege, asserting [**33] only that plaintiff had obtained them legitimately. Wisehart further cautioned Jacoby that plaintiff had retained a copy "for her own protection" and he had no control over what she might do

with the information, suggesting that she could release it to the press.

On Wednesday, July 3, 1991, defendants moved for a protective order pursuant to CPLR 3103, and that very day the parties appeared in court. Wisehart consented to WGM's request for interim relief, including that plaintiff (herself present in the courtroom) turn over to her lawyer "everything in her possession," and that he secure all copies in his vault. Over the Fourth of July holiday, however, plaintiff hand-copied parts of the documents from the set she had retained at home, returning the documents to Wisehart on Friday, July 5. Even then, plaintiff kept her handwritten notes, and the documents were placed in a locked cabinet for which she had a key.

Lipin v. Bender, 84 N.Y.2d 562, 566-67, 644 N.E.2d 1300, 1300-01, 620 N.Y.S.2d 744, 744-45 (1994). The Appellate Division had previously commented:

It was plaintiff herself who seized the opportunity presented to obtain an unfair advantage over [**34] her adversaries in this litigation. Her improper conduct was then compounded by counsel, who could have readily returned the documents or sought further direction from the court, rather than permitting his client to return to his office and make copies of the disputed documents and then sought to take advantage of such [*254] improper conduct by scheduling a "settlement conference."

Lipin v. Bender, 193 A.D.2d 424, 426-27, 597 N.Y.S.2d 340, 342 (App. Div. 1st Dep't 1993), aff'd, 84 N.Y.2d 562, 644 N.E.2d 1300, 620 N.Y.S.2d 744 (1994). For other aspects of this matter with similar judicial observations, see Lipin v. American Nat'l Red Cross, 1996 U.S. Dist. LEXIS 396, Nos. 93 Civ. 1334, 92 Civ. 4455, 1996 WL 18901 (S.D.N.Y. Jan. 17 1996), aff'd, 113 F.3d 1229, 1997 WL 279912 (2d Cir. May 22, 1997), cert. denied, 522 U.S. 1047 (1998).

Kellwood also called to my attention Lightfoot v. Union Carbide Corp., 1997 U.S. Dist. LEXIS 13279, No. 92 Civ 6411, 1997 WL 5430766, at *2 n.2 (S.D.N.Y. Sept. 4, 1997), aff'd, 175 F.3d 1008 (2d Cir. [**36]), cert. denied, 145 L. Ed. 2d 49, 120 S. Ct. 56 (1999), where Wisehart, attorney for the plaintiff, in an apparent effort to evade an undesired conclusion, moved, without basis, to recuse Judge Harold Baer of this Court, occasioning the following footnote in Judge Baer's opinion:

While on the subject of plaintiff's attorney's conduct, the Court notes that plaintiff's counsel, Arthur Wisehart, has a peculiar habit of filing recusal motions. Not only has he previously filed a recusal motion in this case (which was denied), but defendants identify at least four other cases in which he has filed such motions, often based on evidentiary or other rulings of the judge in question. On at least one occasion, the judge in question chastised Mr. Wisehart and noted that "the material that Mr. Wisehart has provided on the recusal subject is so scurrilous and so baseless and so ridiculous that I cannot even begin to be fair to any parties in this case after reading this." Lipin v. American Nat'l Red Cross, 1997 U.S. App. LEXIS 12277, No. 1997 WL 279912 (2d Cir. May 22, 1997) at *5 n.1 (quoting New York State Supreme Court Justice Moskowitz). While the same is not true of the instant [**37] recusal motion, Mr. Wisehart's practice calls into question either his good faith and adherence to Rule 11 in filing such motions or his grasp of the applicable legal issues. Recusal is a drastic remedy, not to be taken lightly. Mr. Wisehart's practice of filing recusal motions when he disagrees with a judge's rulings undermines the gravity with which such motions should be treated and impugns judicial integrity by implying rampant bias.

Wisehart responded on September 23, 1999, to Kellwood's bringing the foregoing to my attention by filing not only a motion to strike Kellwood papers containing all this, but in addition Wisehart now charged 1) that Kellwood's lawyers, Morgan, Lewis & Bockius, and its partner Christopher Parlo (who coincidentally had been involved

with the Lipin action at the time Lipin took the documents discussed), see supra pp. 17-20, had participated in an "entrapment conspiracy" n20 in the Lipin v. Bender case, supra, by intentionally placing the to-be-"purloined" n21 documents in front of where Lipin would sit n22 so she could take them n23 and 2) Wisehart further charged Kellwood's attorney Wall and his firm Morgan, Lewis in this case with "attempted [**38] extortion" for sending Wisehart a demand letter for the $ 145, 452.68 that the panel had earlier awarded to Kellwood to [*255] be paid by Wisehart. On the basis of this asserted "attempted extortion as defined in Black's Law Dictionary," n24 Wisehart now seeks from this Court an award of treble damages against Morgan, Lewis and its two partners for "deceit [and] collusion with intent to deceive the court" under N.Y. Jud. Law § 487 (McKinney 1983). There is not a scintilla of evidence before me to support any of these claims against Morgan, Lewis or Parlo or Wall- - other than Wisehart's and Lipin's self-serving, conclusory statements they are so. The defamatorily-described claims are flatly rejected.

Thereafter, Kellwood, as it had been given leave in the panel's June 23 rulings to submit documentation supporting its final costs, sought a supplemental award for the final billing statements of the arbitrators. On October 20, 1999, the panel issued its second ruling on fees and directed Wisehart to pay an additional $ 7,784.96. In response thereto, Wisehart again moved on November 8, 1999 for leave to supplement and amend the petition herein.

Oral argument was heard before me on November 19, 1999. While Kellwood had advised me it was waiting until all the panel's awards were filed to move to confirm, n25 it had not formally so moved, and, at that time, Kellwood orally [**40] placed on the record its motion to confirm the arbitration awards.

Turning first to Wisehart's motion to strike Kellwood's said Memorandum of Law in its entirety, Kellwood's memorandum is not abusive or improper if Kellwood has a basis for its contentions and those contentions are responsive to some issue or issues. In light of Wisehart's representation to this Court as to Freeman's internal memoranda being "dissents", and the arguments he made therefrom, Kellwood obviously had the right to put evidence before the Court supporting its belief that Freeman had not dissented, and that indeed Freeman had so advised Wisehart, before Wisehart filed papers making that claim before me. Kellwood's proffer to show that Wisehart has, to other courts' awareness, acted similarly in the past is relevant to whether this Court should assess what it finds to be his actions here as unintended, or what weight to give to the conclusions he draws from the Freeman [**41] memoranda of June 5 and July 3 that he claimed were dissents, when apparently told to the contrary, and how his letter of attack to the AAA against arbitrator Liebowitz, see infra pp. 38-42, should be viewed, not only in its totality, but specifically the last paragraph where Wisehart is conjecturing about a "vacancy" on the panel which might come to pass. See supra pp. 8-9 and infra note 39. Thus, extensive judicial recitals of Wisehart's conduct in other cases could be quite relevant to this Court's assessment of the panel's conclusions as to Wisehart's intentions behind his conduct during the arbitration here where the unanimous panel eventually bluntly sanctioned him for misconduct. Under these circumstances, Kellwood's submissions and arguments are neither abusive nor improper. Accordingly, I deny Polin's motion to strike Kellwood's memorandum in opposition.

Turning to Polin's numerous collateral attacks on the award, "the showing required to avoid summary confirmation of an arbitration award is high and a party moving to vacate the award has the burden of proof." Willemijn Houdstermaatschappij, BV, v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) [**42] (citation omitted). "Moreover, 'arbitration awards are subject to very limited

review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" Id. (citation omitted). "The 'primary purpose' of the Federal Arbitration Act is 'ensuring that [*256] their private agreements to arbitrate are enforced according to their terms.'" Baker Marine (Nig.) Ltd., v. Chevron Ltd., 191 F.3d 194, 197 (2d Cir. 1999) (quoting Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479, 103 L. Ed. 2d 488, 109 S. Ct. 1248 (1989)). Under the Act, an arbitration award may be vacated under 9 U.S.C. § 10(a):

(1) Where the award was procured by corruption, fraud, or undue means.
(2) Where there was evident partiality or corruption in the arbitrators, or either of them.
(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(4) Where [**43] the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). "Under the FAA, the validity of an award is subject to attack only on those grounds listed in § 10, and the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist," Wall Street Assocs. L.P. v. Baker Paribas Inc., 27 F.3d 845, 849 (2d Cir. 1994), by clear and convincing evidence, Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988); LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334, 1339 (9th Cir. 1986). "In addition to statutory grounds, . . . a district court may vacate arbitration awards when the arbitrators acted in manifest disregard of the law." Willemijn, 103 F.3d at 12. The reach of this doctrine is severely limited. Halligan v. Piper Jaffray,

Inc., 148 F.3d 197, 202 (2d Cir. 1998), cert. denied, 526 U.S. 1034, 143 L. Ed. 2d 378, 119 S. Ct. 1286 (1999).

Polin has [**44] made a plethora of arguments that the award should be vacated under each of the four subsections of 9 U.S.C. § 10(a) above.

Starting with § 10(a)(1), to vacate under this section, it must be abundantly clear that "the award was procured by corruption, fraud, or undue means." Karppinen v. Karl Kiefer Mach. Co., 187 F.2d 32, 34 (2d Cir. 1951). For reasons that follow, I do not find that Polin has established any of the allegations by an "abundantly clear," an "affirmatively stated," or a "clear and convincing" standard - - or by any other standard.

Here Polin alleges that the award was procured by "undue means or fraud or corruption" because Kellwood's counsel, as opposed to Kellwood itself, paid arbitrator Liebowitz on two of his invoices to Kellwood for his agreed fees. n26 This has been discussed extensively earlier and must be touched on again as it is the basis of different claims by Polin, but to repeat, there being some "glitch" in a payment from Kellwood's corporate offices, and with Liebowitz and Wall all on the phone, Wisehart's asserting "and that would cause us substantial injury to have that kind of delay[,]" and both lawyers [**45] were told by Liebowitz that he could suspend the proceedings until he was paid, and Liebowitz continued: "if the next one is similarly for the same reason subject to the glitch, the same thing happens, so it does concern Arthur [Wisehart], because if that is the procedure and I decide to invoke, he would not have any other proceedings until the bill is paid," see supra note 5, Kellwood's law firm quickly paid the first two invoices during the month of June 1998 in order to avoid any delay. Kellwood paid directly [*257] all Liebowitz' other invoices. Thus, the fact that two payments to the neutral arbitrator came through Kellwood's law firm as opposed to Wisehart's negotiated method of some Kellwood corporate account does not, against this background, in any way establish that

the award was procured by "undue means, fraud, or corruption."

Polin's next contention that the award was procured by "undue means or fraud or corruption" is based on arbitrator Liebowitz' May 28, 1998, threats "to discontinue his services as such unless Kellwood promptly made certain payments that he claimed to be due to him." This is not only in the same vein as above but also is a distortion of the said Wisehart secretly recorded conversation. See supra note 5. What Liebowitz did say was: "I would like to know what kind of time frame we will have in the future, when I can expect payment." Liebowitz then informed both parties that he had the authority under the agreement to suspend, if necessary, the proceedings if payment was not prompt. In this, he was accurately paraphrasing the AAA rule applicable to this arbitration which reads, "if Arbitrator compensation or administrative charges have not been paid in full, the administrator may so inform the parties in order that one of them may advance the entire payment. If such payments are not made, the tribunal may order the suspension or termination of the proceedings." (Tr. of Oct. 29, 1998, at 49-50). Liebowitz was then "advanced the entire payment" as observed above. These claims are meritless. [**47]

Polin next alleges that the award was procured by "undue means or fraud or corruption" because arbitrator Liebowitz -- who is a lawyer -- was being paid a per diem rate of $ 2000, Wisehart asserting that that fee was double the fee Liebowitz listed in the Federal Mediation and Counsel Service. But Wisehart had proposed Liebowitz and had signed him on having full knowledge of the $ 2000 a day fee from a letter that Liebowitz sent to Wisehart in January of 1998, announcing his willingness to accept the appointment and stating his fee. This was three months before the arbitration proceedings began, and Wisehart never questioned the fee before or during the proceedings. n27

Polin next asserts several additional contentions that the award should be vacated under § 10(a)(1), alleging [**48] various Kellwood misconduct which resulted in the award being procured by "undue means or fraud or corruption." First, that Kellwood's counsel "falsely" represented in its opening statement that Kellwood discontinued the She Knows!! because it lost eight million dollars. n28 Polin argues that this statement was false because that eight million dollar figure failed to take into account a one million dollar plus offset that Kellwood had as a result of its lawsuit against Enteks who had supplied poor quality cloth which contributed to She Knows!!'s demise. Wisehart having made the panel aware of his contention that the eight million dollar figure was inaccurate, the panel thereafter took note of the offset. n29 Second, Wisehart accuses [*258] Kellwood of "falsifying financial information involving She Knows!!" and "failing to have separate, specific financial statements prepared in accordance with Generally Accepted Accounting Principles" in order to conceal some alleged tortious interference by defendant Harding. As to this, Polin failed to present to the panel or now to this Court any evidence to support his contentions. n30 Specifically, he presented no evidence that the financial information [**49] supplied was false nor evidence that this information and Kellwood's decision not to keep separate balance sheets for the She Knows!! division was designed to conceal an allegedly tortious interference by Harding. Third, Wisehart accuses Kellwood's counsel of destroying certain cloth bolts which Wisehart argues here were relevant to Polin's claims. Regarding this alleged spoliation of evidence, the panel considered this claim and specifically found that the bolts of cloth and product samples were not relevant to the case, see supra note 31, and moreover, even though not relevant, Polin was given an opportunity to examine the original cloth patches from the Enteks matter of which Wisehart apparently made nothing. In fact, Kellwood in the Enteks matter had pleaded in its answer a damage figure which Wisehart used to argue the true loss caused by She Knows!! was not eight million dollars. In this connection I note that

"the fact that there is an argument against the truth of any of the statements [by counsel] does not establish that the arbitration award was the result of fraud." Cook Chocolate Co. v. Salomon, Inc., 748 F. Supp. 122, 126 (S.D.N.Y. 1990), [**50] aff'd, 932 F.2d 955 (2d Cir. 1991).

Next, Polin turns to subsection two of 9 U.S.C. § 10(a) asserting "evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). The burden of proof is on the party asserting bias, In re Arbitration between Reed & Martin, Inc. & Westinghouse Elec., 439 F.2d 1268, 1275 (2d Cir. 1971), and "evident partiality" means that "a reasonable person would have to conclude that an arbitrator was partial to one party," Morelite Constr. Corp. v. New York City Carpenters Benefit Funds, 748 F.2d 79, 83- 84 (2d Cir. 1984), or against a party. Sun Ref. & Mktg. Co. v. Statheros Shipping Corp. of Monrovia, Liberia, 761 F. Supp. 293, 302 (S.D.N.Y.), aff'd, 948 F.2d 1277 (1991).

To meet this burden, Polin makes the same distorted factual claims as to arbitrator Liebowitz' alleged threats to resign, dealt with in another context, which are refuted by the transcript, see supra p 25, the amount of his fee, see supra pp. 25-26, and his receipt of a part of his fee from Kellwood's counsel as evidence of partiality. But, as dealt with earlier, a review of the [**52] transcript of that May 28 telephone conversation n31 does not support the inference that "a reasonable person would have to conclude" that Liebowitz was partial to Kellwood or biased against Polin. Liebowitz, as observed earlier, whom Wisehart contracted to have Kellwood (and not his own client) pay, just wanted to be paid, and was merely informing the parties - - accurately, as discussed elsewhere - - that he had the authority to suspend the proceedings unless his fee was paid. This is hardly partiality to Kellwood. [*259] Indeed, in that phone call while discussing Liebowitz' fee delay, Wall saying to Wisehart, "I don't think that you have any business in this whatsoever[,]" Liebowitz contradicted him, saying that

Wisehart did have a concern because if the proceeding were suspended Polin would obviously be effected. This hardly supports an inference that Liebowitz was biased against Polin. And even further Liebowitz, in pressing Wall to get his fees paid, stated that he was not going to "subsidize a multi-million dollar corporation" and did not want "Arthur" n32 to be injured by delay. This speaks only of irritation against Kellwood. The very payments Polin now complains of - [**53] - after the adverse award - - benefitted him at the time, when his lawyer Wisehart said that delay would "cause us substantial injury." n33

Polin next argues that Liebowitz' partiality is shown by his alleged August 7, 1998, threat to discontinue unless at the conclusion of the hearings Polin, in response to questioning by Liebowitz, states that he had received a full and fair hearing. Polin alleges this threat was made in the presence counsel for both parties but was not recorded, but there is no evidence that the threats were made. Since Wisehart is the only one asserting this conversation ever took place, and he has submitted no affidavit as to its existence, this issue is therefore not competently before me, and I decline to address it. Significantly, the first time Wisehart asserted this allegation was in the AAA letter submitted on October 23, 1998, which is nine days after [**54] the panel dismissed two of Polin's three claims, two days after the panel refused Polin's request to subpoena four additional witnesses, the Friday before the Monday in which Kellwood was to begin its defense, and seven days before the parties had agreed that the arbitration proceedings would end. The panel found, "The allegations of the [AAA] letter were clearly false and known by Wisehart to be false. Panel Chair Liebowitz never stated that he would resign unless Wisehart agreed he received a fair hearing, nor did he threaten to resign if he did not receive payment." (Arbitrators' Opinion of Apr. 10, 1999, at 45). Additionally, Liebowitz never conducted an inquiry at the end of hearings, and Kellwood's counsel, Wall, has stated under oath that such a threat never occurred. Moreover, when the

panel gave Wisehart an opportunity to support his allegations, Wisehart declined to do so. See infra pp. 38-40. Given the seriousness of these allegations, if true, one would have expected Wisehart to react in early August when the threat was made and not in late October as the proceedings were coming to an end.

Polin also argues that Kleinman, the arbitrator chosen by Kellwood, was [**55] evidently partial to Kellwood because he failed to disclose on his resume that he had performed services for the American Arbitration Association. Polin states that he would not have signed the arbitration agreement if he had known that Kleinman had done legal services for the AAA. The AAA had essentially nothing to do with this arbitration. Kleinman's past service for the AAA could not possibly create an impression that Kleinman would be partial towards Kellwood or against Polin. The argument has no merit. n34

Polin argues that the very fact that the award granted Kellwood the remedy of one half its arbitration costs shows that the panel was biased against Polin. Polin also argues that bias was shown by the arbitrators' dismissal of the age discrimination claims as frivolous. The mere fact that the arbitrators find in favor of the opposing party on the basis of evidence [*260] coming out during the arbitration [**56] does not establish partiality. LLT Int'l, Inc. v. MCI Telecommunications Corp., 18 F. Supp. 2d 349, 354 (S.D.N.Y. 1998).

In same vein, Polin alleges bias because the arbitrators denied his request for certain documents. The panel's decision not to order the production of certain documents or certain witnesses does not support an inference of bias. Arbitrators have the power to determine what is relevant, material, and cumulative, and to interpret the procedural rules of the proceeding. Bias is not even established by showing that an arbitrator consistently agrees with the arguments of one side and repeatedly finds in their favor.

Bell Aerospace Co. v. Local 516 Int'l Union, United Auto., Aerospace & Agric. Implement Workers, 500 F.2d 921, 923 (2d Cir. 1974).

Polin argues that the bias which Liebowitz had against Polin is attested to by attorney Martin Seham, who came in at the end as special counsel to Wisehart, representing him at the October 28 and October 29 hearings, which were held as a courtesy to Wisehart in order to give him an opportunity to explain his prima facie defamatory letter to the AAA. See infra pp. 38-40. Seham described Liebowitz [**57] as "demonic and irrational" and "bizarre". I give Seham's characterizations no weight. Seham, a long-time friend of Wisehart, present as Wisehart's attorney, had an obvious partiality. When, during this hearing on the issue of Wisehart's letter to the AAA, arbitrator Liebowitz indicated there was no basis for briefs to be submitted thereafter, Seham's rude responses highlight his attitude:

CHAIRMAN LIEBOWITZ: There are no facts to underline your argument.

MR. SEHAM: I don't know whether this guy has the attention span to read a whole brief.

CHAIRMAN LIEBOWITZ: Which guy are you talking about?

MR. SEHAM: There is a guy making jokes. In any event, the reading experience is different than the individual witness mode.

CHAIRMAN LIEBOWITZ: It's a question of either testimony or we take representations. You either prove what you've got or not. Not in a brief. You can argue, in a brief you can argue whatever you want, but it's got to be based on the record of evidence.

ARBITRATOR KLEINMAN: How do you argue farther when no facts have been presented?

MR. SEHAM: There are facts.

ARBITRATOR KLEINMAN: Not in this hearing. What was in a brief, you then provide all the facts and then argue [**58] from those facts, which you didn't present here.

MR. SEHAM: The issue here is an issue that you guys have developed, and the issue is the sanctions.

(Tr. of Oct. 29, 1998, at 88-89). Additionally significant is the observation of Liebowitz' conduct by Freeman, the arbitrator Polin had appointed, in a statement made after these events:

ARBITRATOR FREEMAN: On Monday morning I stated my experience in April, June and through August. At no time did I find Liebowitz anything but impartial. I would like to add to that, including these few days. I left out the August 14, the September and all conferences [sic] calls. I think he has been, if anything, initially very much, leaning toward one side, to give the Plaintiff [Polin] every opportunity. I saw that consistently.

I think an accusation of unfairness, it is simply unacceptable.

(Id. at 80-81).

Polin in this context argues that the Freeman's internal memoranda and "dissents" exhibit the arbitrators' partiality. These are discussed in detail supra pages 15-17. There is no evidence in any of these documents of partiality by the other two arbitrators, and Freeman's observations [*261] in his August 19, 1999 memorandum [**59] about Wisehart, who had appointed him, supra p. 2 and note 16, are based on and supported by the record, and I note that notwithstanding, Freeman found in Polin's favor on the fraudulent inducement claim in a dissent.

Polin next asserts the award should be vacated under 9 U.S.C. § 10(a)(3) because "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by

which the rights of any party have been prejudiced." 9 U.S.C. § 10(a)(3). "Courts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review." Tempo Shain Corp. v. Bertek, 120 F.3d 16, 20 (2d Cir. 1997). Arbitrators are not required to "follow all the niceties observed by the federal courts." Bell Aerospace, 500 F.2d at 923. While it is clear from the text of the statute that arbitrators should hear all evidence proffered that is "pertinent and material," an error in their determination of "pertinent and material" must be one that deprives a party of a fundamentally [**60] fair arbitration process. Tempo, 120 F.3d at 20. Additionally, an arbitrator is not required to hear all evidence proffered, id., because an arbitration panel "need not compromise speed and efficiency, the very goals of arbitration, by allowing cumulative evidence." Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes, 37 F. Supp. 2d 248, 251 (S.D.N.Y. 1999). An arbitrator is merely required to give each party an adequate opportunity to present its evidence and argument. Tempo, 120 F.3d at 20.

Polin claims that the arbitrators engaged in misconduct by granting Kellwood's motion to quash Polin's subpoena for James Jacobsen and by refusing to sign a subpoena duces tecum directed at D.L. Thompson dated October 17, 1998, requesting the production of financial documents, and that these financial records "would have exposed the mendacious nature of the decision to shut down She Knows!! as an entity eliminate Chuck Polin from Kellwood upon the pretext of financial reasons to be a hoax." (Pet'r Pet. to Vacate P71). Regarding the Jacobsen subpoena, the panel granted Kellwood's motion to quash apparently based on the evidence, [**61] discussed earlier at page 3, which was that the arbitration agreement itself precluded any further discovery except for two circumstances which were not applicable, and that Polin had already been provided with over 5000 pages of financial records. And I note that, Jacobsen did testify as a witness for Kellwood and was

subject to cross examination. With regard to Polin's subpoena duces tecum to Thompson, this was issued after the close of Polin's direct case. The panel, concerned that Wisehart was attempting to relitigate his direct, n35 chose to first hear Kellwood's defense before determining whether the subpoena would be relevant to Kellwood's defense. This was within their power.

Polin next argues that the panel engaged in misconduct by refusing to hear "pertinent and material" evidence and points to a telephonic conference on August 14, 1998, one week after the close of Polin's direct case. This refers to Wisehart's offer of proof as to [**62] Paul Celona and Sherri Polivka discussed elsewhere. But the panel accepted the offer and heard Celona, and while it rejected his offer of proof as to Polivka, I note that despite years of discovery in this litigation it appears that Wisehart never spoke to Polivka, never secured a statement from her, and failed to list her on his witness list. Moreover, as part of Kellwood's case, Polivka did later testify and was subject to cross-examination. Given the circumstances, there was no misconduct here.

[*262] Polin argues that the panel engaged in "willful misconduct" by finding Polin's age discrimination claim "frivolous", and the arbitrators "acted irrationally" in refusing the credit Polin's testimony as well as Holding's testimony. But disagreeing with the panel's assessment of the evidence and its conclusions is not sufficient to vacate an arbitration award under § 10(a)(3).

Wisehart argues generally that the "dissents" of Freeman exhibit the panel's refusal to hear evidence which prejudiced Polin's rights. As discussed earlier, supra pp. 15-17, I consider only the April 10, 1999 and October 26, 1998 dissents. As to the October 26 dissent, Freeman simply dissents on the dismissal of [**63] the age discrimination and fraud in the inducement claims and does not mention anything about the other arbitrators refusing to hear evidence. As to the April 10

dissent, a perusal of the dissent reveals that Freeman disagrees with the weight and relevance given to certain evidence. He states, "Now to the crux of the matter, Kleinman has stated that the discrepancies of when Polin and Harding first spoke is not material. I believe it is of great import." (Arbitrators' Opinion of Apr. 10, 1999, at 50). There is no statement whatever about a refusal to hear evidence, but only a disagreement on what evidence to credit and what not. Moreover, these dissents do not exhibit a denial of "fundamental fairness" in this arbitration.

Polin argues that the panel engaged in misconduct by holding sanction hearings that "tortiously interfered with Polin's due process right to counsel." The transcript of the "sanction hearings" reveals that the hearings, after all the evidence was complete on the merits, were offered as a courtesy to Wisehart in order to allow him an opportunity to explain what the panel viewed as his prima facie defamatory letter to the AAA, threatening Liebowitz' further relationship [**64] with the AAA and thus his livelihood. Wisehart declined to respond. The panel did not deny Polin a fundamentally fair arbitration process by granting Wisehart the opportunity to explain this extraordinary and unexpected damaging action. These hearings took place on October 28-29, 1998, which is two months after the close of Polin's direct case. Polin was not denied the opportunity to present evidence or any way prejudiced with in the meaning of § 10(a)(3) by these "hearings." Regarding Polin's assertion that this was a denial of his due process right to counsel, first, the FAA contains no provision requiring parties to be represented by counsel in arbitration proceedings. But second, where a party chooses to be represented, it cannot be said that the arbitrators engaged in misconduct because they gave the attorney an opportunity to explain what appeared to them as outrageous action. See infra pp.38-39 for arbitrator Kleinman's remarks.

The argument of "willful misconduct and misbehavior" by the arbitrators that Polin makes based on an affidavit of John W. Whittlesey, Esq., hardly need comment. Whittlesey was a

part-time law associate of Wisehart, and Whittlesey's sworn assertion [**65] that in his expert view Polin had established a prima facie case of age discrimination and that therefore the imposition of a sanction for a "frivolous" age discrimination claim was unwarranted is no more than a supplemental brief, and entitled to no evidentiary weight. Nor need credibility be given to such an insider's non-neutral purported expert opinion. See Stachniak v. Hayes, 989 F.2d 914, 925 (7th Cir. 1993).

Polin alleges that "respondents, respondents' counsel and the Arbitrators tortiously interfered with the testimony of witnesses and subsequently caused the arbitrators to quash petitioner's subpoenas of Joseph and D.L. Thompson." (Pet'r Mem. of Law in Supp. dated Aug. 11, 1999, at 9-10). I observe that Wisehart's rather inflammatory choice of words - - "tortiously interfere" - - is without support. Polin apparently in this context objects to the panel's [*263] decision not to issue these subpoenas both dated October 17, 1998. This is dealt with supra pages 32-33. I find no misconduct in the panel's decision.

Polin makes three separate arguments about Liebowitz' alleged dereliction of duty constituting misconduct. First, Polin argues that Freeman's "dissents" [**66] reveal that Polin's age discrimination claim was dismissed because of Kleinman, Kellwood's partisan arbitrator, and not because of Liebowitz. This argument was dealt with supra pages 15-17, 31 and note 16, Freeman having repudiated these alleged "dissents". Second, Polin argues that the threat and imposition of a sanction award were improper and violated the role of a neutral arbitrator. This argument is dealt with infra pages 37-42. Third, Wisehart states that "arbitrator Liebowitz abandoned all pretense of neutrality by appointing arbitrator Kleinman, a partisan arbitrator, to function as the grand inquisitor of the arbitration panel with regard to punitive proceedings." However, after Wisehart's letter to the AAA attacking Liebowitz' reputation, it was quite appropriate to have Kleinman chair the proceeding since he was an attorney and Freeman was not. Polin has in no way

established Liebowitz' misconduct with these three allegations.

Polin argues that "their [presumably Kleinman and Liebowitz'] misconduct on a continuing basis has come to light in the record of extensive ex parte communications which they have engaged in with Kellwood's counsel throughout the [**67] extended period in which they have collaborated to destroy or incapacitate the law firm of WISEHART & KOCH through the imposition of sanctions that they had no jurisdiction to impose." (Pet'r Mem. of Law in Supp. dated Nov. 8, 1999, at 7). Polin cites no evidence for this allegation. The ex parte conversations he lists in P 153 of his Petition to Vacate all involve conversations between Liebowitz and Kleinman. Both being arbitrators, there is no misconduct. With regard to the alleged ex parte conversations in P 154 of that petition, some those conversations were referenced in Freeman's "dissent" of July 3, which Freeman repudiated. I do not find that the remaining conversations were improper just because they took place. Polin has presented no evidence that substantive issues were discussed. The way the agreement was structured there had to be conversations between and among the participants in this arbitration, and everyone had to know this. The agreement required Kellwood to pay for all the arbitration expenses and all such presumably had to be arranged through them. Kellwood was also paying the expense of its own arbitrator, Kleinman, and the fee of the neutral arbitrator, [**68] Liebowitz. The other alleged ex parte conversation cited in P 154 has to do with procedures, scheduling, arranging for transcripts. Nothing is shown to be improper. In fact, Wisehart was specifically aware these conversations were occurring. On May 28, 1998, within Wisehart's hearing on the surreptitiously-recorded phone call, Liebowitz referred to conversations he was having with Wall n36 and directed Wall to contact Kleinman because Liebowitz was unable to. n37 Polin has no basis to claim that all of these conversations constituted misconduct. Additionally, Polin cannot argue that the mere occurrence of

an ex parte conversation constitutes misconduct when the record [*264] reflects that his lawyer Wisehart and his paralegal Lipin engaged in ex parte conversation with arbitrator Freeman. After being chastised for discussing a motion with Freeman, Wisehart responded that he did not see a problem with the conversation since Freeman was a partisan arbitrator. n38 I find no misconduct here.

For Polin's final argument under § 10(a)(3), Wisehart states: "The punitive award of sanctions against petitioner's counsel [Wisehart] is an attempt by respondents' counsel [Wall] in collusion with arbitrators Liebowitz and Kleinman to obstruct justice by incapacitating petitioner's counsel to make it impossible [**70] to prosecute claims for obstruction of justice in the form of the admitted destruction of relevant evidence [the bolt of cloth and product samples from the Enteks matter] by respondents' counsel or their law firm, and also the suppression of the accounting records that are needed, exposes the fraudulent basis of the contentions made by them invalidating the arbitration decision." (Pet'r Mem. of Law in Supp. dated Nov. 8, 1999, at 15). There is no evidentiary support for the collusion claim, and all the rest has been discussed and rejected earlier in connection with other Wisehart arguments.

Polin next makes a number of arguments under the fourth and last subsection, 9 U.S.C. § 10(a)(4): "Where the arbitrators exceeded their powers." There is no dispute that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT & T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986) (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960)). [**71] The inquiry here therefore "focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether

the arbitrators correctly decided that issue." DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 824 (2d Cir. 1997), cert. denied, 522 U.S. 1154, 140 L. Ed. 2d 187, 118 S. Ct. 1180 (1998).

Polin argues that the award granting Kellwood half of its expenses, including attorneys' fees, is in violation of PP 1, 7, and 8 of the arbitration agreement in that the agreement only allows the panel to grant remedies only to Polin and not to Kellwood. However, the parties' arbitration agreement incorporated the National Rules for the Resolution of Employment Disputes of the American Arbitration Association giving the panel broad remedial power, and providing that the panel "may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court." Since this case had started as an action in this Court and was to come back to this Court for review, the panel could grant [**72] any remedy that would have been available under a court's inherent power and, explicitly, to protect the panel's integrity and the integrity of the arbitration process generally, which integrity the panel, headed by a lawyer, felt was being badly abused. n39 [*265] Perhaps even more distressing to the panel was Wisehart's refusal to respond when the panel gave him an opportunity (at the end after all the evidence had been received on the merits of the case itself) to tell them, n40 as arbitrator Kleinman stated:

why he [Wisehart] leveled those accusations and the basis for those accusations, because we don't know what the basis of that is. To us, upon reviewing the record, we don't believe there is a basis for that. n41

(Tr. of Oct. 29, 1998, at 36).

Wisehart's attitude toward this proceeding began to emerge minutes later when arbitrator Kleinman reprimanded Wisehart's lawyer Seham for interrupting, the transcript reading:

ARBITRATOR KLEINMAN: [to Kellwood's attorney Wall] You may proceed.

MR. SEHAM: What did you say?

MR. WISEHART: He said you are a joke.

MR. SEHAM: I'm a joke?

ARBITRATOR KLEINMAN: Can we stop the colloquy?

MR. WISEHART: That's what he [**74] said.

ARBITRATOR KLEINMAN: Stop the colloquy between individuals here. Mr. Wall will you conclude?

(Id. at 55-56). And finally the transcript reads:

ARBITRATOR KLEINMAN: I would like to ask Mr. Wisehart on the record whether he is intending to decline to respond to the questions of the Panel based upon your earlier representation.

MR. WISEHART: I concur with what my counsel said. I do decline. I do decline. On constitutional grounds as well as jurisdictional grounds.

(Id. at 62). Thus the record before the arbitrators contains no basis whatever for Wisehart's highly defamatory statements about arbitrator Liebowitz to the AAA, [*266] accordingly leaving the reasonable conclusion that 1) there was no basis for them and 2) the purpose of the attack, as Kellwood's attorney Wall on the record conjectured, n42 was to destroy this arbitration which Wisehart saw going against his client, presumably forcing a settlement or a rearbitration. Having Liebowitz off the panel was certainly in Wisehart's mind when he wrote at the end of his AAA letter "if there is a vacancy." See supra page 9.

Lest it be conjectured that the above conduct of Wisehart is being unreasonably assessed by this Court in an isolated context, the words of Justice Karla Moskowitz, the New York State trial judge initially assigned to Lipin case, supra, come to mind with resonant redolent relevance. I quote from pages 331-34 of the Joint Appendix before the Second Circuit in Lipin v. American Nat'l Red Cross, 1997 U.S. App. LEXIS 12277, at *15, Nos. 96-7195, 96-7193, 1997 WL 279912, at *5 n.1 (2nd Cir. May 22, 1997), which that Court quoted in footnote 1:

The exchange leading to Justice Moskowitz's recusal went as follows:

* * *

The Court [Justice Moskowitz]: . . . The material that Mr. Wisehart has provided on the recusal subject is so scurrilous and so baseless and so ridiculous that I cannot even begin to be fair to any parties in this case after reading this. I am so concerned about this that if it were under his affirmation instead of his client's affidavit, I would feel compelled to turn this over to the grievance committee. Because for an attorney to stand up in court and address the Court the way Mr. Wisehart did last time, and to supply the court with such ridiculous[,] . . . such off-the [**76] wall allegations about a sitting judge is so egregious that I really can't even see and I can't even look at this case anymore and dispense justice. Now, that means Mr. Wisehart has accomplished exactly what he set out to accomplish, which is to obtain my recusal from this case. But I am not doing it for reasons that his clients set forth in an affirmation, because I don't even understand them . . .

* * *

I don't have to stand up in a courtroom and be addressed by an attorney, who is supposedly an officer of the court, in a manner that Mr. Wisehart addressed me last week and the manner he addressed me this week. And I will not listen this week. I recuse myself. That's it.

Since the case was originally filed in this Court, any remedy available under Rule 11 of the Federal Rules of Civil Procedure was available to the arbitrators, and AAA rule 32(d), providing that an "arbitrator shall have the authority to provide for the reimbursement of representative's fees, in whole or in part, as part of the remedy, in accordance with the applicable law," was also available to the arbitrators. In addition, Polin's complaint in this Court starting this action, though voluntarily transferred [**77] to arbitration, alleges in paragraphs 58 and 62 age discrimination claims under the New York City Human Rights Law (NYCHRL), New York City Administrative Code § 8-502 which allows attorneys' fees to be awarded to the prevailing party. n43 [*267] The panel interpreted this provision, too, as authorizing them to reimburse Kellwood for its attorney's fees and costs. As arbitrators have the authority to fairly interpret an arbitration agreement, the panel had authority here.

Moreover, the basis for Kellwood's request for attorneys' fees and the imposition of sanctions [**78] arose after the arbitration agreement was signed. It was only after the claims were dismissed that the claim for attorneys' fees arose under the NYCHRL and under rule 32(d). To read the agreement as permitting only a remedy or award to Polin is contrary to the very purposes of arbitration, namely, efficiency and speed. If it were otherwise, the initiating party could delay or dissemble, and the injured adversary would have initiate another proceeding to recover for its injury. Willoughby Roofing & Supply Co. v. Kajima Int'l., 598 F. Supp. 353, 357-58 (N.D. Ala. 1984), aff'd, 776 F.2d 269 (11th Cir. 1985), supports the panel's construction of the broad language here.

Equally meritless is Polin's contention that the panel exceeded its authority by awarding Kellwood half its expenses allegedly contrary to the language of the arbitration agreement which provided that Kellwood would pay for its own arbitrator, the neutral arbitrator, and the arbitration

proceeding expenses. Though the arbitration agreement does so read, it also reads that the arbitrators may direct otherwise. See supra pp. 2-3. This, and the arbitrators' broad remedial powers under [**79] rules 32(c) and 32(d) gave them the power to treat the remedy they awarded as a sanction even though flowing from authorizing language contained in the arbitration agreement.

Polin next asserts the arbitrators acted in manifest disregard of the law. "In addition to the statutory grounds, a district court may vacate arbitration awards when the arbitrators acted in manifest disregard of the law," Willemijn, 103 F.3d at 12, or the evidence, Halligan, 148 F.3d at 202. The only asserted support of this that needs even mention is that the panel found that Polin's supposed replacement, Polivka, was forty years old and within the same protected age group and that individuals other than Polin had been terminated or retired from Kellwood after their divisions lost money. As stated earlier, the panel summarized its evidentiary finding the following way:

Aside from Polin's belief that Sherri Polivka of Kellwood is 'youthful looking,' Polin should have remained at Kellwood, and that he rather than Polivka should have headed up a continued She Knows!! operation, a claim which conflicts with the evidence of Polin's own part in bringing about the demise of [**80] She Knows!! . . . there is simply no ground for a claim of age discrimination.

(Arbitrators' Opinion of Apr. 10, 1999, at 26). It cannot be said that the panel under any standard manifestly disregarded the law or the evidence in this case.

Wisehart argues that the awards against him should be vacated because they violate New York's public policy against an arbitration award imposing punitive damages. Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976); Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 519 (2d Cir.), cert. denied, 502 U.S. 942, 116 L. Ed.

2d 331, 112 S. Ct. 380 (1991). However, to the extent the sanction award here might be viewed as punitive rather than compensatory to Kellwood for various damages, i.e., multiplication of costs to Kellwood by reason of Polin's tactics, etc., I do not view this public policy applying here where the [*268] parties' arbitration agreement gave the arbitrators broad power to award "any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court. [**81] " (National Rules for the Resolution of Employment Disputes Rule 32(c) (American Arbitration Association 1997)); see Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59, 131 L. Ed. 2d 76, 115 S. Ct. 1212 (1995). Accordingly, this argument is rejected.

Polin also argues that public policy concerns raised in Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters, 969 F.2d 1436 (3d Cir.), cert. denied, 506 U.S. 1022, 121 L. Ed. 2d 585, 113 S. Ct. 660 (1992), require vacating this award. In Stroehmann, the court concluded that "an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy", id. 969 F.2d at 1442 (emphasis added), because "it undermines the employer's ability to fulfill its obligation to prevent and sanction harassment in the workplace." Id. Unlike Stroehmann, however, where the arbitrator refused to address the alleged sexual harassment, the arbitrators here directly addressed the age discrimination claim and found it frivolous. Polin's arguments thus are the same as his statutory [**82] arguments under 9 U.S.C. § 10 but now dressed in public policy argument clothes. Having earlier found these arguments without merit, I similarly conclude that Stroehmann is not applicable.

Thus, viewing everything factual and legal recited in pages 11 through 43 of this opinion, I find there is more than enough support in the record for the panel's factual, legal, and jurisdictional conclusions as to the sanctioning of Wisehart for misconduct, starting with its finding, at supra

pages 12-14, that Wisehart had made "false representations" as to what Celona would testify and going on to five further enumerated findings as to Wisehart, at supra page 14, with the amount of the sanction being its reasoned view of the injury to Kellwood by Wisehart's said misconduct. Kellwood's motion to confirm these findings and conclusions is granted.

In sum, Polin's motions to vacate are denied and Kellwood's motion to confirm the panel's various awards on the merits and the sanction awards against Wisehart is granted in all respects.

The foregoing is so ordered. A formal order may be submitted by either party on notice.

Dated: New York, New York

June 29, 2000 [**83]

Richard Owen

United States District Judge

Footnotes

n1 See Polin v. Kellwood Co., 1996 U.S. Dist. LEXIS 22534, No. 93 Civ. 7876, 1996 WL 665639 (S.D.N.Y. Nov. 13, 1996); Polin v. Kellwood Co., 1994 U.S. Dist. LEXIS 17117, No. 93 Civ. 7876, 1994 WL 673496 (S.D.N.Y. Dec. 2, 1994) (involving a minor sanction ($ 500) against Polin for Kellwood's attorney's fees for wrongfully delaying discovery requiring two motions to compel).

n2 Knowing its amount, Wisehart negotiated for Kellwood to pay the neutral arbitrator's fee in its entirety. (Arbitration Agreement P 8(2)). See infra p. 3.

n3 By stipulation, the parties agreed to the dismissal of any claims against defendants Enoch Holding, Jr., Harry Harding and Kellwood Sportswear and that Kellwood

assumed the liability of these dismissed defendants. (Stipulation, dated Mar. 10, 1998). [**5]

n4 Other than the parties incorporating the AAA rules into the agreement, the AAA itself was in no way involved in the arbitration.

n5 The transcript, not disputed as to accuracy, turns out to be of assistance to the Court on issues that later developed. See infra pp. 6, 9, 25, 28, 36. It reads:

MR. LIEBOWITZ: . . .

Housekeeping item number 3.

I have not been paid and I am very unhappy about it, contrary to my understanding as to the fee. It is contrary to sound business practices and our contract, as far as I am concerned.

I brought it up a number of times to Steve [Wall]. I spoke to his assistant a couple of days ago, and she said she would check into it and let me know.

I have been told that ten days is the usual time and the sound business practice is 30. If you have some other arrangements that you would intend to make, I would like to know about it, and I would like it to be taken care of. To me this contrary to what my understanding was and is.

* * *

MR. LIEBOWITZ: I have to bring it up to both of you because it involves the case, and Arthur is not directly involved in the issues.

MR. WALL: In response to your call to my assistant, I called the general counsel of Kellwood, and inquired as to where the bill was, and he had it on his desk and he said he was immediately going to process it. That's what I know of today.

MR. LIEBOWITZ: All right. That bill is dated April 6, and if this is the procedure that we are going to be going through,

I would like to know what kind of time frame will we have in the future, when I can expect payment. Then I will be able to evaluate my position. Did you say something Steve?

Steve, Arthur, Steve.

MR. WISEHART: I am right here, waiting to hear what's said.

MR. LIEBOWITZ: I don't know. Steve.

Maybe he said hold on.

MR. WALL: Hello. Hi. I do not, I have no further information at my fingertips other than what I just communicated. I will follow-up on it and be able to tell you more. But as of right now what I know is what was communicated.

MR. WISEHART: I don't think that responded to the request as to future intent.

MR. LIEBOWITZ: If this is the procedure whereby it sits around on people's desks as a couple of months go by, at least, then I would like to know that. That was not my impression.

This is a big company, as far as I know, am I involved here in subsidizing people for a month or two months on bills, and if so, I would like to know that.

WALL: I don't know what you want me to tell you. I am not paying the bill.

Do you want me to write a check?

I am not going to write a check.

I am telling you what I learned from my client, and that is all I can tell you.

MR. LIEBOWITZ: Okay.

MR. WALL: I told you that I will look into it more, and I will. And I will inform you what I find out. But that is the best I can do.

MR. WISEHART: I think you could tell him what your recommendation would be.

MR. WALL: I don't think that you have any business in this whatsoever, Mr. Wisehart, unless you are prepared to contribute to this. We made arrangements that were fully known to you, that Kellwood was paid, would pay the full expenses of the neutral arbitrator and we are committed to that and that will happen. And I don't know what glitch occurred which caused this delay in payment.

It is a rather unusual situation, in that I am assuming that that's what caused the glitch. And I will follow-up with it as promptly as I can to see when you are going to get paid. It is not our intent to delay payment or not pay.

It was, as I agreed with you, I thought it was reasonable, given the spread of time of the hearing that you bill us at the conclusion of each set of hearings and which you did and that is still my present intent.

And I would certainly hope that your bill for the next stage, which I assume would come to us at the end of next week, is going to processed very promptly.

MR. LIEBOWITZ: All right. You are telling me that you will do what you can to move through any glitch that there is, that is good enough.

MR. WALL: If it makes any difference, Mr. Kleinman hasn't been paid either, and I am having the same conversation with him. I am trying to find out what the problem is.

MR. LIEBOWITZ: All right. I don't want to belabor this, this is embarrassing to me. The neutral chair of a panel should not have to make these calls.

Maybe if somebody misplaces a bill or something, you have to kind of remind them.

I don't relish this at all. But I will tell you that there is a procedure and I have applied it in other cases, where this kind of thing happens and inured, and that is to suspend the

proceeding until the bill is paid. And if the next one is similarly, for some reason is subjected to the glitch, the same thing happens, so it does concern Arthur, because if that is the procedure and I decide to invoke, he would not have any other proceedings until the bill is paid.

MR. WISEHART: And that would cause us substantial injury to have that kind of delay.

MR. LIEBOWITZ: I don't want to do it. There is a procedure in place, and I don't believe that person in my position should be coming around saying hey about paying my bill, it is not the position to put an arbitrator in.

I can't speak for Ken Kleinman. But I find this very distasteful to have to get into this. I am also not going to proceed and subsidize for a multi-million dollar corporation. If there is a problem, I expect to know about it. If there is a time frame that has to be arranged and I expect to know about it, fine. I guess enough has been said, and I would depend on you Steve to get this straightened out. Okay.

MR. WALL: Yep.

MR. LIEBOWITZ: I am sorry that it had to come up at all, but I may as well be up front with it. . . .
(Tr. of May 28, 1998, at 16-22). [**7]

n6 Liebowitz' surprise is apparent:

MR. WISEHART: The issue is a more substantive issue.

MR. LIEBOWITZ: Is anybody making a recording?

They shouldn't be.

It is totally unauthorized. I will tell you that I am going to bar it.

I should have - - I am starting to get a real bad feeling about this whole proceeding.

I have bent over backwards to make time available to you both and now you are making a recording without my permission; it is not a hearing.

MR. WISEHART: I said at the beginning, the letter we sent that you did not receive said that we anticipated that there might be ruling at the conference, so I apologize.

MR. LIEBOWITZ: Who gave you authority to record it? Is this going to be part of the record, offered as part of the record of this hearing? If it is, I will reject it.
(Id. at 23-24).

n7 Excerpts from the transcript of the October 21, 1998, telephonic conference reveal the panel's expressed concerns: ARBITRATOR LIEBOWITZ: [addressing Wisehart] Haven't we been through this before . . . This is all argument and testimony that is in the record. . . . I'm not going to go through this whole record over and over again. That's your direct case. It's in. . . . I just don't have the time to re-litigate this whole case, with all due respect. . . . As far as I'm concerned, we're on Kellwood's rebuttal case. . . . You don't even know what the heck it [Kellwood's rebuttal case] is, and you're already subpoenaing witnesses. Which from your own statement sounds like, to me, is to repeat your direct case, and you can't do that. . . . You're trying to load this record. . . . You're running up a tremendous bill for Kellwood and not doing anything. All of this stuff is in the record, your exhibits that your referring to, all of your testimony about what these guys supposedly did.
(Tr. of Oct. 21, 1998, at 33-35).

n8 But see supra note 2 and the Arbitration Agreement itself at pages 2-3, where this very payment method had been negotiated by Wisehart. The panel found: "The only reason Panel Chair Liebowitz was paid by Kellwood, rather than by both Polin and Kellwood, is that Wisehart insisted on such an arrangement as a condition to agree to arbitration (Agreement P 8.2)." (Arbitrators' Opinion of Apr. 10, 1999, at 45). [**14]

n9 Footnote by the Court: This claim of "withholding" payments to coerce the arbitrator is the opposite to

Wisehart's present contention before this Court that Kellwood's counsel should be censured for advancing two payments to Liebowitz to avoid the delay that Wisehart wanted to avoid, see supra note 5, and that this advancement constitutes grounds for vacating the award.

n10 Footnote by the Court: Arbitrator Kleinman was at that point addressing attorney Martin Seham whom Wisehart brought in to represent him individually.

n11 The panel in its unanimous opinion on this subject deduced that the claim was asserted "to justify a claim for counsel fees pursuant to the New York City Human Rights Law", (Arbitrators' Opinion of Apr. 10, 1999, at 26), which is what Wisehart demanded in his complaint. (Compl. PP 58, 62). Wisehart now before me erroneously claims this action was brought under the Age Discrimination in Employment Act which he asserts does not provide for fees to prevailing employers.

n12 Footnote by the Court: Polivka had by this time testified and been subject to Wisehart's cross examination.

n13 See supra note 11.

n14 While the panel summarized Celona's testimony, I note that the panel in this crucial fact-specific area (and from the Court's own reading of the record) was scrupulous in its attention to and specific citing of transcript references:
First, Celona testified that he had no personal conversation with November, but was part of a sales group conference call, at which November simply stated that Harding determines which customer gets shipped deliveries (Tr. 1992). Celona did not testify as to any of the statements that Wisehart had represented November allegedly told Celona. Second, Celona testified that Holding did not believe that Harding was giving She Knows!! adequate support or

attention (Tr. 1984), but he made no mention of intentional "sabotage." Third, far from testifying that Rutherford gave no assistance and support, Celona testified at length that he worked with Rutherford to work out fit problems (Tr. 1971) and sample problems (Tr. 1975), and that She Knows!! was permitted, with Harding's endorsement, to hire pattern maker, Ed Jenkins, to speed the process and provide better customer response (Tr. 1976, 2012). He also testified that it was She Knows!!'s decision to sell a far more extensive line than simply the loafer pant, which was beyond Rutherford's ability, was not consistent with the original business plan outlined in July, 1991, and which required import sourcing (Tr. 1977, 2006-2007). It was also She Knows!!'s decision to try to produce a line for late fall, 1991, which led to production problems (Tr. 2006). Finally, and significantly, Celona testified that Harding's decisions to ship one customer rather than another was simply a "senior management decision" to obtain the best "impact" of the available resources (Tr. 2022).
(Arbitrators' Opinion of Apr. 10, 1999, at 36-37).

n15 See infra note 16 for Freeman's memorandum detailing this.

n16 Wisehart's motion to strike this apology of his own arbitrator (not disputing Freeman's authorship nor signature) on the ground it was not sworn fails because Kellwood offered it to rebut Wisehart's putting before me and quoting to the Court from the two earlier Freeman internal memoranda, they being equally unsworn. Wisehart's further attack on the statement as "manufactured" is based on Lipin's September 23, 1999 affidavit, PP 27, 30-36, 38-40, 42-44, where she recites numerous calls by her to Freeman and his wife, but there, even she, aside from innumerable conclusory phrases, does no more than indeed support the first of two basic points of Freeman's August 19 statement, (the entirety of which is set forth hereafter) which is that there was a time when 1) there were many calls between the arbitrators

(which they were entitled to have and should have if they felt it necessary), and 2) that Freeman was "furious" over what he thought was "improper action between Kleinman and Wall" arising from certain billings [A]. But Lipin's affidavit neither disputes nor even addresses the second and crucial fact in Freeman's statement that thereafter Kleinman explained everything to his "complete satisfaction" and that Freeman in substance had so advised told Lipin and Wisehart and had signed the award accordingly. [B]

[A] As a footnote to the footnote: Kleinman was the arbitrator appointed by Kellwood, and the arbitration agreement provided that Kellwood was to pay Kleinman's bills, and, of course, Wisehart saw nothing wrong with talking ex parte to his own arbitrator Freeman, see infra note 37.

[B] As a footnote to the footnote: In Lipin's affidavit in PP 38-9, Lipin is talking about a "dissent" that was not a "dissent" (see the text, below).

August 19, 1999

A STATEMENT: re WISEHART SUBMISSION OF LAW

It is incumbent upon me to clarify a few things relative to quotes attributed to me in Mr. Wisehart's submission. First and foremost he had no right to do this and he knew that. He knew full well that this was an internal matter between the arbitrators and was never intended as another dissent on "fraud in the inducement." Mr. Wisehart had been in toucn [sic] with me on a couple of occasions expressing concern about the award. I did not discuss that with him other than to listen to him state that it could ruin him. In the meantime I continued to reread everything as I had done in the instance of Mr. Kleinman's footnote reference to my dissent on fraud in the inducement in the final opinion. In my reading of everything I came across some billings sent by Ms. Angeline in February that gave me some concerns. When I received additional billings from her in May I became furious. I discussed it with Mr. Liebowitz and subsequently sent him a

scathing report relative to what I believed were improper action between Mr. Kleinman and Mr. Wall. Mr. Liebowitz forwarded my report to Mr. Kleinman who in seeing it understood the way it appeared to me. In a rather long call he explained to me the details of the six instances that I cited to my complete satisfaction. At the conclusion he asked if I would be willing to sign off on the award, and I said send it. I signed it, had it notarized and sent it in. In a call from Mr. Wisehart he asked if I had anything I [sic] that could help. This was prior to my call from Mr. Kleinman. He asked me to send it to him. I did not. The following week I had a call from Joan Lipton [sic] saying that they hadn't received anything. This was one of several calls from her. I told her there was nothing they could use from it. I mailed it. Somewhere in the next few days they received their copy of the award with my signature on it. That brought two calls from Mr. Wisehart urging me to an affidavit including the three documents I had done. The reason was according to him that by my signing the award I had negated my dissent on the fraud in the inducement. I said I wouldn't. Over the next week I had three or four more calls from Joan making the same point on behalf of Mr. Wisehart. I told her the only one that mattered was the one that dealt with facts in the case.

To the point of this statement. I owe an apology to Mr. Kleinman and to Mr. Wall for allowing this to fall into Mr. Wiseharts [sic] hand. I marked myself an idiot for believing he would act ethically. He has deliberately submitted quotes that he knew were not valid in order to give the reader the impression that this was currently my belief. I had refused to do what he asked, so he fraudently [sic] submits this, aware that I had repudiated it to accomplish what he wanted. Had I thought back to October and his actions on the eve of the last hearings with his missile to the AAA on his charge against Mr. Liebowitz for partiality, followed by his refusal to submit proof, I should have expected this. I will leave the other material in his submission to others far more qualified than me to refute.

Respectfully submitted

/s/ Martin Freeman

Martin Freeman Arbitrator

n17 As to Lipin's vigorous objection at PP70-71 of her affidavit of September 23, 1999, as to Kellwood allegedly knowing the falsity of its statement in its brief that she "stole a stack of privileged documents from opposing counsel," I note that the word "stolen" was the very word used twice by the Court of Appeals for the Second Circuit describing the finding by New York Supreme Court on this subject. Lipin v. American Nat'l Red Cross, 1997 U.S. App. LEXIS 12277, Nos. 96-7195, 96-7193, WL 279912, at *1 (2d Cir. May 22, 1997). [**35]

n18 Lipin knew from her employment as a paralegal this was improper, by reason of the attorney-client privilege, but did so deliberately. Lipin v. Bender, 193 A.D.2d 424, 426-27, 597 N.Y.S.2d 340, 342 (App. Div. 1st Dep't 1993), aff'd, 84 N.Y.2d 562, 644 N.E.2d 1300, 620 N.Y.S.2d 744 (1994).

n19 Footnote by the Court: The Appellate Division had earlier observed:
Plaintiff further revealed that counsel had advised her, on the day the documents were obtained, that "you can't lie so you have to say yes, you by mistake picked up his documents." The plaintiff insisted, however, that the documents were not taken by mistake, but rather, "it was my own recognizance and my own protection."
193 A.D.2d 424, 426-27, 597 N.Y.S.2d 340, 342 (App. Div. 1st Dep't 1993), aff'd, 84 N.Y.2d 562, 644 N.E.2d 1300, 620 N.Y.S.2d 744 (1994).

n20 Wisehart's September 23, 1999, memorandum, page 17-18, reads:
"Counsel for defendants including Mr. Parlo and his firm Morgan Lewis & Brockius, LLP, participated in an entrapment scheme . . . [They] intentionally placed these

documents in front of Ms. Lipin as part of their entrapment conspiracy."

n21 See Lipin v. Bender, 216 A.D.2d 131, 629 N.Y.S.2d 3 (App Div. 1st Dep't 1993). [**39]

n22 Lipin undercuts this in her September 23, 1999, affidavit, paragraph 84, by allocating to Morgan, Lewis' attorney Parlo knowledge of a litany of those who could have placed the file "entrappingly" in front of her, which litany includes the Special Referee himself as a possibility.

n23 This argument, one notes, was never raised in the state court hearings.

n24 Pet'r Mem. of Law in Supp. dated Sept. 23, 1999, at 22.

n25 Resp't Supp. Mem. of Law in Opp. filed Sept. 10, 1999, at 3.

n26 This claim, it must be remembered, is made against a background that it was Wisehart who proposed Liebowitz as the neutral arbitrator, see supra p.1, and it was Wisehart who negotiated and signed the arbitration agreement, which provides that Kellwood was to pay Liebowitz' fees.

n27 I note that a $ 2000 per diem fee breaks down to $ 250 per hour for an eight hour day. This is not "so excessively high" or "so far beyond the applicable standard for such services" as to constitute a separate ground for vacatur.

n28 The transcript reads:

ARBITRATOR LIEBOWITZ: Thank you, Mr. Wisehart. Mr. Wall for Kellwood.

MR. WALL: Mr. Arbitrators, this case can be summarized in three words. Disappointment, exaggeration and desperation.

Disappointment. There is not a single person in the Kellwood world who does not recognize the disappointment

associated with the failure of the She Knows venture. That venture was an operation for approximately fifteen months. It lost $ 8 million dollars in fifteen months. Mr. Polin was the titled president of that operation.
(Tr. of Apr. 1, 1998, at 33).

n29 The transcript reveals that the arbitrators heard Wisehart's argument and debated the actual loss to She Knows!! caused by the Enteks supplied cloth, (Tr. of June 1, 1998, at 218-221), Wall observing, "So if you accept his argument its not $ 8 million loss, it is $ 6.6 million in loss. And I suppose he is going to argue that if you only lose $ 6 million, then you shouldn't be fired." (Id. at 219).

n30 The panel found:
Wisehart also accused Kellwood of destroying evidence and maintaining false financial records. He stated that the She Knows!! balance sheets were "obviously manufactured document[s]." (Tr. 436). He provided no support for his serious allegation. Wisehart also alleged that Kellwood deliberately destroyed evidence, i.e., several bolts of cloth and product samples, which indeed were not relevant to the case, and were disposed of after unrelated litigation was settled (9/18/98 Conf. Tr. 16).
(Arbitrators' Opinion of Apr. 10, 1999, at 39) (emphasis added).

n31 See supra note 5.

n32 Liebowitz was at that point calling Wisehart by his first name.

n33 See supra note 5.

n34 I note that arbitrator Freeman - - that Wisehart selected for Polin - - had been a recent client of Wisehart's.

n35 See supra note 7 for the verbatim expressions of concern.

n36 See supra note 5.

n37 While discussing the order of witnesses to appear, Liebowitz said the following in Wisehart's hearing to which Wisehart remained mute:

MR. LIEBOWITZ: That's it. It will be after Mr. Holding on the 1st, we will have the whole term. That was housekeeping item number 1 that I wanted to bring up. And I got a call from Mr. Kleinman. Would you be kind enough to advise him, Steve, that I couldn't get back to him and –

MR. WALL: I will leave him a message.

MR. LIEBOWITZ: There will be an argument on the motion and there will be a ruling.
(Tr. of May 28, 1998, at 14-15). [**69]

n38 The transcript reads:

MR. WISEHART: We can get the AT&T people to put in the other arbitrators if that is going to be an impediment. I have spoken with Mr. Freeman about this, just yesterday, and he says that our request for the information that the subpoena would require has his full support. So I don't know what, I don't see what point there is in making that kind of a technical argument.

MR. WALL: Otherwise, you had an ex parte conversation about the motion with an arbitrator without the presence of any one else, in and of itself is a problem.

MR. WISEHART: I don't see that it is a problem, he is a partisan arbitrator, you know that. But I am perfectly willing to set it up so that all the parties, arbitrators can hear. I asked him about his availability.
(Id. at 4).

n39 Liebowitz, the neutral arbitrator, who had been with the AAA for years and had been proposed in a letter by Wisehart to Wall, was obviously disturbed - - one even senses outraged - - at Wisehart's unexpected letter to the AAA toward the close of the case, which is here specifically quoted:

9. The neutral referee [Liebowitz, identified by name at the end of the letter] further stated that if counsel for Polin [Wisehart] states that he has not received a fair hearing, he will abandon the case and will decline to decide the dispute to be arbitrated.

* * *

11. The neutral arbitrator's off-the-record threat [alleged to have occurred on August 7, 1998,] to decline to decided the case unless plaintiff waives his fair hearing and due process rights is violative of the National Rules, the Due Process Protocol, and also the Federal Arbitration Act, 9 U.S.C. § § 10,11

* * *

13. Such a threat, particularly when made off the record, is a perversion of the arbitration process and the National Rules.

* * *

15. The problem is aggravated by the fact that contrary to paragraph 38 of the National Rules for the Resolution of Employment Disputes, entitled "Neutral Arbitrator's Compensation," the defendants have been making payments directly to the neutral arbitrator, by-passing the American Arbitration Association,[These payments, Wisehart knew, were never to go through the AAA.] a procedure that is objectionable.

* * *

22. However, it is clear that the defendants would withhold any further payments to the neutral arbitrator as a means of coercing him into desisting from granting such additional time necessary to complete the arbitration.
(Letter from Wisehart to the AAA of Oct. 23, 1998). [**73]

n40 Wisehart's attorney Seham had requested up to several weeks to prepare. To this, the arbitrators responded:

ARBITRATOR KLEINMAN: This isn't a matter of the need for discovery. This isn't a matter of having to review the entire record. Mr. Wisehart knowingly wrote what he wrote. He'll have an opportunity to confer with you [Seham], that's why we agreed to put it off until tomorrow and tell you what it is he meant by these things so that he can then explain that to us. That's all there is to it.

CHAIRMAN LIEBOWITZ: And what is the basis of it.
(Tr. of Oct. 28, 1998, at 16-17).

n41 Kleinman's entire statement to Wisehart and Seham is set forth supra page 10.

n42 The transcript reads:

MR. WALL: . . . With respect to the substance of why we're here, Kellwood strongly believes that the letter which was filed last Saturday with the American Arbitration Association - - I misspoke - - which was delivered by hand last Friday to the American Arbitration Association, but not served on either Kellwood or any of the arbitration members until Saturday, October 24, is nothing more than an attempt by Mr. Wisehart to antagonize and intimidate the Arbitration panel and particularly Mr. Liebowitz, in the hope that Mr. Liebowitz would recuse himself and resign from the Panel, thus upsetting the entire proceeding and requiring Kellwood to engage in the outrageous expense and time expenditure that it has already been forced to engage in by reason of Mr. Wisehart's delay tactics.
(Tr. of Oct. 29, 1998, at 46-47).

n43 I note that now before me, Wisehart, at page 21 of his Memorandum dated September 23, 1999 asserts that the panel did not have jurisdiction to award sanctions against him because "as [Kellwood's counsel] is presumably aware

the ADEA does not provide for attorney's fees . . . to a prevailing employer." But Wisehart had not sued under the ADEA, but under the New York City Human Rights Law, which does permit such an award to a prevailing employer.

93 Civ. 7876 (RO)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES S. POLIN, Plaintiff,

v

KELLWOOD COMPANY, KELLWOOD SPORTSWEAR, ENOCH HARDING, JR., and HARRY HOLDING, Defendants.

November 12, 1996, Decided

COUNSEL:
[*1] For CHARLES S. POLIN, plaintiff: Arthur M. Wisehart, Wisehart & Koch, New York, NY.

For KELLWOOD COMPANY, KELLWOOD SPORTSWEAR, HARRY HOLDING, ENOCH HARDING, JR., defendants: Christopher A. Parlo, Morgan, Lewis & Bockius, New York, NY.

JUDGES:
Hon. Richard Owen, United States District Judge.

OPINION BY:
Richard Owen

OPINION:

MEMORANDUM AND ORDER

OWEN. District Judge

Before me are discovery matters.

First, defendants move to dismiss plaintiff's claim for failure to prosecute. Defendants contend that plaintiff took no action for eighteen months, from January 25, 1995, the date of the last deposition, until August 8, 1996, when defendant improperly noticed the deposition of Mr. John Henderson, a Vice-President of Kellwood Company. Defendants claim the notice of deposition was improper because Mr. Henderson was noticed for a deposition in New York, and Mr. Henderson's regular place of business is in St. Louis. Defendants have no objection to arranging the deposition of Mr. Henderson in St. Louis. They do object, however, to the deposition being taken in New York.

While there is something going for it, in the exercise of discretion, the motion to dismiss for failure to prosecute is [*2] denied. I have already noted the "unfortunately leisurely pace" at which plaintiff was proceeding in my December 1, 1994 order which appears to continue, but since that time plaintiff has noticed the deposition of Mr. Henderson and defendants have agreed to make him available, at least in St. Louis.

Second, plaintiff cross-moves to compel the deposition of Mr. Henderson and the production of related documents in New York City, given the asserted convenience to all persons involved. Plaintiff contends that Mr. Henderson is regularly in New York City in Kellwood's offices on business and that he also maintains a residential property in New Jersey which Mr. Henderson frequently visits. Defendants acknowledge that Mr. Henderson is in New York "on occasion" and has a residential property in New Jersey, but contend that this request is simply further proof that plaintiff will not prosecute this action if such action requires plaintiff to leave New York.

The motion is disposed of as follows: the deposition of Mr. Henderson is to take place in New York if Mr. Henderson schedules travel to New York at any time over the next four months from today's date. Defendants are to notify the

plaintiff [*3] two weeks in advance of Mr. Henderson's arrival in New York and make arrangements for the deposition with plaintiff's counsel. Mr. Henderson is to bring with him to New York those books and records requested by the plaintiff in connection with his deposition. If Mr. Henderson does not come to New York during the next four months, he is to be deposed by plaintiff's counsel in St. Louis where Mr. Henderson maintains his office. The deposition is to occur within the four months provided. In that case, any production of documents is also to take place in St. Louis.

The motions are disposed of accordingly, which is so ordered.

Dated: New York, New York

November 12, 1996

Hon. Richard Owen

United States District Judge

93 Civ. 7876 (RO)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES S. POLIN, Plaintiff,

v.

KELLWOOD COMPANY, KELLWOOD SPORTSWEAR, ENOCH HARDING, JR., and HARRY HOLDING, Defendants

October 26, 1994, Decided

October 27, 1994, Filed

COUNSEL:
[**1] For Plaintiff: Wisehart & Koch, Arthur Wisehart, Esq., Michael Prince, Esq., Of Counsel.

For Defendants: Morgan, Lewis & Bockius, Steven R. Wall, Esq., Christopher A. Parlo, Esq., Of Counsel.

JUDGES:
Owen

OPINIONBY:
RICHARD OWEN

OPINION:

[*141] MEMORANDUM AND ORDER

OWEN, District Judge:

Before me is a motion by plaintiff Charles Polin to disqualify Morgan, Lewis & Bockius, counsel for defendants Kellwood Company, et al. Polin is a former employee of Kellwood. In this action he claims that he was terminated from employment because of age discrimination, that he had been fraudulently induced by Kellwood to accept employment, and that defendants Harding and Kellwood Sportswear tortiously interfered with his employment relationship with Kellwood through a variety of actions which negatively affected the Kellwood division of which Polin was President. Kellwood retained Morgan, Lewis to defend here.

Morgan, Lewis is also defending Kellwood in another pending lawsuit, Enteks v. Nursu Okurer v. Kellwood, 92 Civ. 5881 (S.D.N.Y.) earlier commenced by a former supplier of merchandise to Kellwood. In Enteks, the plaintiffs allege that Kellwood refused to pay for certain goods. Polin, plaintiff in this case, was [**2] the President of one of Kellwood's divisions when the events in Enteks occurred, and had enough involvement in the events to be interviewed by others in the company exploring the matter. He, however, was not named as a party in that matter, nor was he mentioned anywhere in the complaint. Even so, some time after Polin and Kellowood had parted company, the Enteks plaintiffs sought his deposition and Morgan, Lewis attorneys Kerri Howland and James Harbison met with him to prepare for it.

Plaintiffs' motion to disqualify essentially arises from his version of conversations with Howland and Harbison during the deposition preparation as to which he testified in the hearing I had on May 12, 1994:

And I specifically asked Miss Howland, and she assured me in no uncertain terms that she was representing me.

THE COURT: What did she say?

THE WITNESS; I asked a specific question, "Are you representing me?"

THE COURT: And what did she say to that?

THE WITNESS: She said, "Of course." And there was not a prolonged discussion. There was not a detailed discussion. It was a question. It was an answer. And at that point it was not an issue at all.

* * *

[The morning of the deposition] [**3] Miss Howland and Mr. Harbison were there. And I again asked the same question very specifically, no equivocation, to both of them. And again it was a very simple assurance of, "Yes, Chuck, of course we're representing you," or words to that effect.

[*142] He expresses concern that Morgan, Lewis may use "confidential" information obtained from him in the course of that litigation against his interest in this litigation, or that it may "soft-pedal" his interest in the Enteks case to his detriment.

Howland and Harbison also testified before me. They both specifically deny any suggestion of representation. Indeed, Ms. Howland testified:

A: I had been calling Chuck about notice of the deposition going to be scheduled. So I had been trying to set up a time with Mr. Polin, set up a time for a deposition, so there were a series of conversations.

The first conversation I remember him bringing up the fact did I think he should have a lawyer. I said I didn't know the answer to that, that I would have to talk to Jim [Harbison] about it; well, what was the name of his lawyer. And I wrote it down [Arthur Wisehart] on the back of my Rolodex card; the name, address. You've seen a copy of it.

[**4] n1 And we continued to talk about scheduling, and that was the end of that conversation.

So that day I went and spoke with Mr. Harbison about it and told him Chuck has brought up wanting his own attorney. What do you think? And as has been repeated here today, Mr. Harbison said Kellwood's interests and Mr. Polin's interests are the same. I don't see why he really would need a lawyer. And we talked about it for a while. And that was the end of that.

I didn't talk to Mr. Polin again probably for a couple of weeks. I didn't call him back immediately. The next time I talked to him about scheduling I rehashed the conversation I had had with Mr. Harbison about what we had talked about, about the interests being the same. And then we probably had two more conversations about scheduling . . .

Q. Miss Howland, in connection with any of those telephone conversations, did Mr. Polin ever say to you that he was considering suing Kellwood, that he wanted to sue Kellwood or that he had retained Mr. Wisehart for the purpose of suing Kellwood?

A. No.

Q. Did he identify why Mr. Wisehart was his attorney in any way?

A. No.

* * *

A: I would never have said I was representing him personally [**5] because I had the conversations with Mr. Harbison, I had had the conversations with Mr. Polin. I would never contemplate a personal representation of him. I knew he wasn't a defendant, he wasn't a party. My conversations with him were with regard to he was no longer an agent, but he

was a former employee of Kellwood and was going to be a witness of Kellwood at a deposition the next day.

Harbison's recollection was essentially in accord with Howland's.

The Second Circuit has noted that "there is a particularly trenchant reason for requiring a high standard of proof on the part of one who seeks to disqualify . . . counsel, for in disqualification matters we must be solicitous of a client's right freely to choose his counsel. . . ." Government of India v. Cook Indus., Inc., 569 F.2d 737, 739 (1978). And under Evans v. Artek Systems Corp., 715 F.2d 788 (1983), an attorney may [**6] only be disqualified from representing a client in a particular case if:

(1) the moving party is a former client of the adverse party's counsel;

(2) there is a substantial relationship between the subject matter of the counsel's prior representation of the moving party and the issues in the present lawsuit; and

(3) the attorney whose disqualification is sought had access to, or was likely to have had access to, relevant privileged information in the course of his prior representation of the client.

I conclude on this record however, that whatever Polin may have thought, wished or expected, no attorney-client relationship existed at any time between him and [*143] Morgan, Lewis. I credit the testimony of attorneys Howland and Harbison to the contrary – corroborated by Howland's Rolodex card with Mr. Wisehart's name and address on it – that they never agreed to represent him, that they informed him they didn't think he needed separate representation and, in any event, believed – because he told them – that Mr. Wisehart was his lawyer. n2 The mere fact that a corporation's lawyer meets with an employee – or as here, an ex-employee – to prepare for a deposition, cannot make the

employee [**7] the client of the lawyer. Accordingly, no attorney-client relationship existed between him and Morgan, Lewis.

Polin has also failed to show that there was a substantial relationship between the subject matter of the Enteks case and the issues presented in this lawsuit. In Enteks, Kellwood takes the position that certain difficulties were Enteks' fault, whereas in the instant litigation Polin asserts that Kellwood and defendant Harding bear responsibility for the difficulties encountered. This, however, does not establish a "substantial relationship" between the two cases.

Finally, Polin has failed to show that Morgan, Lewis received from him relevant confidential and privileged information as a result of his deposition – or preparation for it – in the Enteks case.

On the contrary, Polin testified:

Q. Now, you testified [**8] that you had had several conversations with various people at Kellwood about this Enteks matter before you ever met Mr. Harbison and Miss Howland, correct?

A. That's correct.

* * *

Q. And those subjects, had you discussed those subjects, the poor quality of the Enteks goods, as well as the damages and losses that you had suffered as a result of that, with other people at Kellwood before you met with Mr. Harbison and Miss Howland?

A. That's correct.

Thus, Polin could have had no expectation of attorney-client confidentiality when he later spoke about the same subjects with Harbison and Howland.

Accordingly, Polin's motion to disqualify Morgan, Lewis is denied, and Kellwood's motion to admit Steven Wall, a member of that firm, pro hac vice, is granted.

So ordered.

Dated: October 26, 1994
New York, New York

Richard Owen

United States District Judge

Footnotes

n1 [Court's Footnote] The Rolodex card was received in evidence on the hearing.

n2 Polin himself acknowledged that he asked Howland if it was necessary for him to have his own lawyer, and at that time, when she asked him who his lawyer was, he said, "Arthur Wisehart."

BEFORE THE ARBITRATION TRIBUNAL
UNDER AGREEMENT DATED FEBRUARY 25, 1998

CIVIL ACTION NO. 93-CV-7876 (RO)

In the matter of

CHARLES S. POLIN
Plaintiff,

vs.

THE KELLWOOD COMPANY,
Defendant.

DECISION ON MOTION

Panel of Arbitrators: Jonathan S. Liebowitz, Esq., Chair
Kenneth D. Kleinman, Esq., Member
Martin Freeman, Member

The Panel, having considered Kellwood Company's Motion for Judgment on Partial Findings, and Plaintiff Polin's opposition thereto, and upon all of the arguments submitted, and upon the entire record in this case, decides the motion as follows:

1. As to Polin's claim for age discrimination, the motion is granted and that claim is dismissed.

2. As to Polin's claim for fraud in the inducement, the motion is granted and that claim is dismissed.

3. As to Polin's claim for tortious interference with contractual/employment relations, the motion is denied and that claim remains before the Panel.

4. The hearings of this case will resume as scheduled on October 26, 1998, on Defendant Kellwood's case, with the

right to rebut by Plaintiff Polin, and will conclude as agreed by the parties on October 30, 1998.

5. Defendant Kellwood's request for counsel fees is denied with leave to renew at the end of the case.

6. Plaintiff's Polin's request for a written explanation of reasons for this decision is granted, but the Panel will render an Opinion at the end of the case.

Dated: October 14, 1998

Jonathan S. Liebowitz, Esq., Chair

Kenneth D. Kleinman, Esq., Member

Martin Freeman, Member

In the matter of

CHARLES S. POLIN vs. THE KELLWOOD COMPANY

DECISION ON MOTION

CLAIM FOR AGE DISCRIMINATION - - - I DISSENT ON THE DISMISSAL

CLAIM FOR FRAUD IN THE INDUCEMENT
I DISSENT ON THE DISMISSAL.

MARTIN FREEMAN

LAW OFFICES
OF
JONATHAN S. LIEBOWITZ

23 MACY AVENUE
WHITE PLAINS, N.Y. 10605
(914) 761-0330
FAX (914) 948-4770

MEMORANDUM

March 11, 1999

TO: Arthur M. Wisehart. Esq.
Wisehart and Koch. Esqs.

Steven R. Wall, Esq.
Morgan, Lewis & Bockius, LLP

FROM: Jonathan S. Liebowitz. Esq.
Panel Chair

SUBJECT: In the Matter of Charles S. Palm vs. The Kellwood Company

Please be advised that the stay requested in Mr. Wisehart's February 25, 1999 memorandum to the arbitrators is denied.

We appreciate the opportunity to be of service.

JSL/daa
copy to: Kenneth D. Kleinman, Esq.
Martin Freeman

BEFORE THE ARBITRATION TRIBUNAL
UNDER AGREEMENT DATED FEBRUARY 25, 1998

CIVIL ACTION NO. 93-CV-7876 (RO)

In the matter of

CHARLES S. POLIN
Plaintiff,

vs.

THE KELLWOOD COMPANY,
Defendant.

AWARD OF ARBITRATORS

Panel of Arbitrators: Jonathan S. Liebowitz, Esq., Chair
Kenneth D. Kleinman, Esq., Member
Martin Freeman, Member

The Panel, having considered and deliberated upon the entire record of the hearings in this case, including all of the testimonial and documentary evidence of record, and having considered all of the arguments submitted by the parties, and upon the entire record in this case, awards as follows:

1. The Panel reiterates and incorporates into this Award Paragraphs 1, 2 and 6 of its Decision on Motion dated October 14. 1998. The Panel finds for Kellwood and against Polin as stated therein.

2. As to Polin's claim for tortious interference with contractual/employment relations, the Panel finds in favor of Kellwood and against Polin. That claim is dismissed.

3. The Panel finds and declares that Kellwood is the prevailing party in this arbitration.

4. Under the provisions of Rules 32(c) and (d) of the National Rules for the Resolution of Employment Disputes of the American Arbitration Association, and Paragraph 7 of the parties' Agreement to Arbitrate Dispute dated February 25, 1998, the arbitrators determine that the costs of this arbitration, excluding witness fees, i.e., representative's fees and expenses (attorneys' fees), arbitrators' fees and expenses. and the costs of the transcripts of the hearings, incurred by Kellwood, shall be assessed against Polin as Plaintiff, but shall be paid to Kellwood by Arthur M. Wisehart, Esq., Polin's attorney, to the extent of one-half thereof. Kellwood's remaining costs of this arbitration, including its fees for attendance of witnesses and the remaining one-half of the costs of the arbitration, shall remain with Kellwood.

5. Under the provisions of the authorities cited in Paragraph 4, above, and under prevailing law, and based upon the misconduct and contempt of the Panel committed by Palm's counsel, Arthur M. Wisehart, Esq., the Panel determines that the costs of this arbitration, defined in Paragraph 4, above, incurred by Kellwood, shall be paid to the extent of one-half thereof by Attorney Wisehart as a sanction for what the Panel finds to be his misconduct and contempt of the Panel.

6. The Panel finds that Attorney Wisehart's misconduct consisted of litigating a claim for age discrimination which the Panel finds to be frivolous as a matter of law, unduly prolonging the hearings, unjustly accusing Defendant Kellwood and its counsel without proffered justification of misconduct, and making a false proffer of proof in connection with the testimony of Witness Celona.

7. The Panel finds Attorney Wisehart in contempt of the Panel because of his submission to the American Arbitration Association of written false and unsubstantiated statements concerning the Panel Chair, under date of October 23, 1998.

8. Polin's request that the Panel reconsider its decision of October 14, 1998 in connection with Polin's claim for fraud in the inducement is denied.

9. The above award of costs of this arbitration shall constitute a basis for a claim by Defendant Kellwood against Plaintiff's attorney, Mr. Wisehart, and shall not constitute a basis for any change in the arrangement by which Defendant Kellwood has paid and is paying the fees and expenses of the Panel pursuant to Paragraph 8, Expense of Arbitration, of the parties' Agreement to Arbitrate Dispute of February 25, 1998.

10. Kellwood shall have until the postmark date of March 16, 1999 to submit an itemized statement of its costs of this arbitration, defined above. Attorney Wisehart shall have until the postmark date of April 16, 1999 to submit papers in opposition thereto. Following receipt of said statement and response, the Panel will issue a Supplemental Award determining those amounts.

11. Either party or both may request, in writing to be postmarked not later than February 25, 1999, that the Panel conduct a hearing(s) on the issues of costs of this arbitration, above. If such request is timely made, the Panel will grant the request and schedule such a hearing(s).

12. All requests, motions and applications to the Panel not specifically determined above shall be deemed denied.

13. The foregoing constitutes the Panel's determination of all of the issues currently outstanding and before it in this case.

IT IS SO ORDERED.

Dated: February 8, 1999

Jonathan S. Liebowitz, Esq., Chair

Kenneth D. Kleinman, Esq., Member

Martin Freeman, Member
STATE OF NEW YORK)
ss:
COUNTY OF WESTCHESTER)

On this 10th day of February, 1999, before me personally came and appeared Jonathan S. Liebowitz, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public, State of New York

OSEPH MONACO, JR
Notary Public, State of New York
No. 03-5004213
Qualified in Bronx County
Commission Expires Nov. 16, 2000

LAW OFFICES
OF
JONATHAN S. LIEBOWITZ

23 MACY AVENUE
WHITE PLAINS, N.Y. 10605
(914) 761-0330
FAX (914) 948-4770

MEMORANDUM

April 10, 1999

TO: Arthur M. Wisehart, Esq.
Wisehart and Koch, Esqs.

Steven R. Wall, Esq.
Morgan, Lewis & Bockius, LLP

FROM: Jonathan S. Liebowitz, Esq.
Panel Chair

SUBJECT: In the Matter of Charles S. Polin vs. The Kellwood Company

Enclosed please find Opinion of Arbitrators dated April 12, 1999. We appreciate the opportunity to be of service.

JSL/daa

copy to: Kenneth D. Kleinman, Esq.
Martin Freeman

BEFORE THE ARBITRATION TRIBUNAL
UNDER AGREEMENT DATED FEBRUARY 25, 1998

CIVIL ACTION NO. 93-CV-7876 (RO)

In the matter of

CHARLES S. POLIN
Plaintiff,

vs.

THE KELLWOOD COMPANY,
Defendant.

OPINION OF ARBITRATORS

Panel of Arbitrators: Jonathan S. Liebowitz, Esq., Chair
Kenneth D. Kleinman, Esq., Member
Martin Freeman, Member

I. PROCEDURAL HISTORY

This matter was initially commenced by the filing of a Complaint in the Southern District of New York on November 10, 1993 by Plaintiff, Charles S. Polin ("Polin"), against his former employer, The Kellwood Company ("Kellwood"), and two individuals, Enoch Harding ("Harding") and Harry Holding ("Holding"). The Complaint alleged three counts: fraudulent inducement with respect to Polin's commencement of employment with Kellwood, intentional interference with contractual relations in connection with Harding's actions allegedly designed to undermine Polin's employment, and age discrimination based on his termination from employment by Kellwood.

By an Agreement dated February 25, 1998, the parties agreed to submit the above-referenced dispute to final and binding arbitration. The court case was placed in civil suspense

pending arbitration. In addition, Holding, Harding and Kellwood Sportswear were dismissed as Defendants because liability was assumed by Kellwood. Arbitration proceedings were conducted in New York City on April 1 through 3, June 1 and 2, August 5 through 7 and October 26 through 29, 1998, which proceedings were transcribed by a court reporter. In addition, the parties conducted telephone conferences with the Panel on August 7, September 18 and October 21, 1998, to discuss and resolve both procedural and substantive matters.

At the conclusion of the arbitration hearing held on August 7, 1998, counsel for Polin, Arthur Wisehart, rested his case on behalf of Polin. Counsel for Kellwood, Steven Wall, then requested leave to file a motion for judgment, on the grounds that Polin had failed to adduce sufficient evidence to sustain his claims. The Panel granted Wall's request and established a briefing schedule. Thereafter, on August 14, the parties engaged in a telephone conference call with the Panel, during which time Wisehart presented offers of proof as to the testimony of two additional witnesses, Paul Celona and Sherri Polivka. After considering Wisehart's representations and Wall's objections thereto, the Panel accepted the offer of proof as to Celona, but rejected the offer of proof as to Polivka. Consequently, the Panel considered the Celona offer of proof as part of Palm's case in chief.

The parties thereafter submitted briefs with respect to Kellwood's Motion for Judgment on Partial Findings. On October 14, 1998, the Panel issued an Award, granting Kellwood's motion as to the fraudulent inducement and age discrimination claims, and denying Kellwood's motion as to the tortious interference claim. fn1

Kellwood presented its case in chief and Polin presented rebuttal testimony during the week of October 26, 1998. On October 29, the day after the conclusion of all testimony, the Panel conducted a hearing on sanctions against Wisehart, in which Wisehart declined to participate. The Panel also established a briefing schedule with respect to the remaining

issue of tortious interference of contractual relations.

After consideration of the entire record, including testimonial and documentary evidence and the arguments submitted by the parties, the Panel issued its Award on February 8, 1999. The Panel found in favor of Kellwood on the tortious interference claim, and awarded one-half the costs of the arbitration, excluding witness fees, to Kellwood, assessed against Wisehart. The sanctions were based on the Panel's finding that Wisehart had engaged in misconduct and contempt of the Panel. By cover correspondence, the Panel advised the parties that a written opinion would be issued by April 12, 1999.

II. SUMMARY OF FACTS

Polin's allegations, which we detail below, may be summarized as follows. Polin had a long and distinguished career as a sales representative and sales manager in the women's apparel industry, specifically in junior garments. As of 1991, he was working as a sales manager with Palmettos, the sales organization f or Hartwell. Based on alleged representations made to him in June 1991 by Harry Holding, Kellwood Vice President of Marketing, and James Jacobsen, Kellwood Executive Vice President of Administration, Polin agreed to leave Palmettos and work for Kellwood in connection with a start-up juniors division, She Knows!!. Originally, Polin understood that he would be Sales Manager, but he was then asked to be President of the division in late July, when the person to whom he would have reported, Larry Golden, decided not to leave Hartwell and join Kellwood.

During the period from July 1991 until November 1992, Polin contends that he was not given the domestic production, sourcing, financial, shipping, delivery, and personnel support that was promised him, as a result of which She Knows!! suffered substantial losses, despite Polin's successful sales efforts. He asserts that this failure of support and Kellwood's

intent not to provide such support establishes both the falsity of representations made at the commencement of his employment and interference with his contractual relations with Kellwood. According to Polin, Harding, as President of Kellwood Sportswear, sabotaged his efforts by directing production elsewhere and both Harding and Holding knew before Polin began employment that such production and other support would not be forthcoming. He also contends that other representations made to him by Holding to induce him to join Kellwood were never fulfilled, and were never intended to be fulfilled.

In November 1992, the She Knows!! operations were transferred to another division, EnChante, based in California. Polin was terminated on June 1, 1993, allegedly based on his age because younger employees were retained. Consequently, Polin filed suit, on the three legal grounds identified above. We address each of these claims separately.

III. FRAUDULENT INDUCEMENT

Polin claims that he was fraudulently induced by Holding and Jacobson to leave Palmettos, forego other potential employment opportunities and join Kellwood. According to Polin, Holding promised him the full domestic production support of Kellwood, job security and stock options and bonuses, and also assured him that She Knows!! would be the only Kellwood junior division. According to Polin, each of these representations was false, and known to be false by Holding when the representations were made. Similarly, Polin contends that Jacobsen also assured him that he would get the full support of Kellwood in the She Knows!! venture, a representation which Jacobsen also allegedly knew was false when made. Polin did not present any evidence as to any representations made by Harding to him before he accepted employment with Kellwood.

Under applicable law, in order to establish fraudulent inducement, Palm must prove that Harding and Jacobsen

made misrepresentations as to material facts which they knew to be false when they made them, for the purpose of inducing Polin to rely on the misrepresentations and that Polin reasonably relied on the statements without knowledge of their falsity, to his detriment. Stewart v. Jackson and Nash, 976 F.2d 86 (2d Cir. 1992); Murray v. Xerox Corp., 811 F.2d 118 (2d Cir. 1987). It is not sufficient for Polin simply to prove that the promises did not come true, because an intent not to perform cannot be inferred from the fact of nonperformance. Murray, 811 F.2d at 121. Instead, he must prove that the persons making the misrepresentations knew they were making false statements when the statements were made. Id.; Stewart, 976 F.2d at 89. It is also axiomatic that Polin could not be induced to join Kellwood by reason of representations made after he decided to accept employment there. Accordingly, the only relevant alleged misrepresentations are those which were allegedly made prior to Polin's decision to join Kellwood. Therefore, in order to assess Polin's claim of fraudulent inducement, we must examine the statements and knowledge of Holding and Jacobsen prior to the date Polin agreed to work f or She Knows!!.

According to Holding, he first discussed the idea of a start-up juniors division at Kellwood in mid-June 1991, when he began employment with the Company (4/1/98 Holding Tr. 51, 60). Polin testified that he spoke with Holding generally about the idea as early as June 5 (Tr. 309). We do not find this discrepancy in testimony to be material, in light of the lack of any testimonial or documentary evidence that there were any formal plans or concrete commitments on the new junior division until mid-June, and the essentially undisputed material facts that occurred thereafter.

On either June 14 or 15, 1991, Polin asked Holding to meet him in Atlanta to discuss the possibility of Polin working for Holding at Kellwood (4/1/98 Holding Pr. 66-67; Tr. 316). This was corroborated by one of Polin's witnesses, Barry Gussoff, who testified that Polin told him about the meeting with

Holding, which Polin said that he had initiated (4/1/98 Gussoff Tr. 14, 61). Prior to that date, Polin had already begun looking to leave Palmettos, in light of the financial difficulties of the company, evidenced by his bounced paycheck (Tr. 300, 308). He acknowledged the turmoil at Palmettos, in part due to Holding's having left Palmettos to join Kellwood (Tr. 301). Although Polin and Holding disagree as to when specific discussions took place on the details of the start-up division, there appears to have been various discussions between Polin, Holding and Larry Golden, who also was interested in leaving Hartwell f or Kellwood, between June 15 and June 20. During these discussions, Polin told Holding that a number of Hartwell employees would be interested in working f or Kellwood (Tr. 106). They did not discuss any specific compensation, although Polin testified that Holding mentioned the availability of stock options and bonuses (Tr. 323-324). Polin also stated that Holding had previously told him that Holding wanted to create a start-up juniors division using the full support and domestic production capacity of Kellwood, which would be the first juniors division at Kellwood (Tr. 309, 329, 332-333). At that time, Holding was considering using Polin to run the sales and office administration of the new division (Tr. 328). Holding allegedly expressed to Polin that the income opportunities were unlimited and that he would "take care of" Polin (Tr. 327). Holding did not testify to this level of detail, although he acknowledged general discussions with Polin concerning Polin's interest in working for Kellwood (Tr. 105106)

On June 20, 1991, Palm and Golden met with Holding and Jacobsen in New York City. At that meeting, both Polin and Golden expressed their interest in joining Kellwood (Tr. 146, 338-352). Jacobsen promised Polin and Golden that Kellwood would provide corporate support and in-house production sourcing (Tr. 341-343). Holding provided salary compensation information, but promised there would be bonuses, stock options and salary increases in the future (Tr. 346-351).

Although Polin did not actually begin employment with Kellwood until July 22, he testified unequivocally that he had decided to go forward with the new employment as of mid-June (Tr. 321, 772). He also stated that when he was offered a proposed raise at Palmettos at the end of June, he did not even consider it, because "I had already mentally committed to Kellwood and verbally to Mr. Holding . . . . At that point, I had already verbally accepted the offer." (Tr.303). Indeed, Polin stated that he left Hartwell at the end of June, to begin making arrangements at Kellwood (Tr. 359). Based on Polin's testimony, then, since he had decided by the end of June to join Kellwood, only those representations made by Holding and Jacobsen, and their knowledge of the truth or falsity of those statements, as of that time, may be considered in assessing Polin's claim. Each of the alleged misrepresentations will be considered in turn.

1. The Representation By Holding That Kellwood Would Provide Domestic production.

Polin asserts that Holding knew Kellwood domestic production was fully booked and therefore could not have supported She Knows!! at the same time he was promising Polin that such domestic production would be the backbone of the She Knows!! manufacturing capabilities. There is simply no evidence that Holding possessed such knowledge prior to July 1991.

Polin testified that Holding advised him that he had Kellwood price a loafer pant, which Kellwood could make less expensively than Hartwell (Tr. 815). Holding did prepare such an analysis, which consisted of handwritten notes dated June 24, 1991 (Exh. P-3). This analysis assumed domestic and 807 production (where the finished product is assembled outside of the United States, typically in Mexico or the Caribbean). Holding worked with a Kellwood financial analyst, Dean Thompson, to prepare a business plan f or the new juniors division, the final version of which was dated July 8, 1991 (Exh. D-4). This proposal specifically

contemplated domestic and 807 production, and was provided to Polin at the June 20 meeting (Tr. 346-348) . fn2 Holding worked with Polin and Golden to create specific sales projections on July 9 for the new division, again based on domestic and 807 production (Exh. P-4). Even after Polin began at Kellwood, the availability of domestic production for She Knows!! was anticipated at least for the Spring 1992 lines, according to a July 26 memo on which Holding was copied (Exh. P-2).

The only evidence of the lack of availability of domestic production is in a memo dated July 16, 1991 from Robert Hairston, a production scheduler, to Harding (Exh. P-7). In that memorandum, Hairston states there is insufficient domestic production capacity to provide the necessary shipments for the spring 1992 line. Holding testified that he never saw this memo (Tr. 127), and he is not copied on it. Polin stated that he did not know whether Holding was aware that there was insufficient domestic capacity before the week of July 23, 1991 (Tr. 817). Indeed, the very purpose of a July 24 scheduled plant tour of Kellwood domestic production manufacturing facilities, was to discuss how such production could assist She Knows!! (Tr. 109) . fn3

Based on the above, there is no basis f or a finding that Holding knew as of mid-June 1991, when Polin accepted employment with Kellwood, that, contrary to Holding's business plans and projections, Kellwood would not be able to provide domestic production f or She Knows!!. Accordingly, his statement that such support would be provided cannot be the basis for Polin's fraudulent inducement claim.

2. The Representation By Holding And Jacobsen That Kellwood Would Provide Support For She Knows!!

Palm also asserts that he did not receive the production, delivery, inspection and shipping support that he was promised by Holding and Jacobsen (Tr. 581). For example, he

alleges, inter alia, that Kellwood refused to ship goods to She Knows!! that were in inventory at Kellwood (Tr. 1416), and that Kellwood did not provide adequate quality control assistance. There is not a scintilla of evidence, however, showing that Holding and Jacobsen, as of late June 1991, did not fully intend to secure whatever support was needed for She Knows!! from Kellwood. Indeed, it appears that Holding staked his career at Kellwood upon the success of this new start-up division, and its failure ensured his failure. He testified, without contradiction, that he ultimately was forced out of Kellwood because of the problems at She Knows!! (Tr. 66, 141). Moreover, Holding clearly expressed his dissatisfaction with Harding's choices of production priorities, possibly even to the extent of stating that he was being "sabotaged" by Harding (Tr. 101). Nor is there any evidence that Jacobsen harbored any knowledge or intention contrary to what was stated to Polin.

In any event, the record is replete with evidence that Kellwood did provide financial support, employee expertise, and administrative support to She Knows!! (Tr. 406-407, 456-457, 474— 475, 594-599, 966, 971). It may well be that the level of support provided did not meet Polin's expectations or even the level necessary to make She Knows!! a success, but that is all in hindsight and cannot be used to infer malevolent intent as of the inception of the project. Accordingly, there is insufficient evidence in the record to support Polin's claim with respect to this representation.

3. The Representation By Holding That Polin Would Have Job Security With Kellwood.

Polin contends that Holding promised him long-term job security, by stating he would "take care of" Polin (Tr. 327). His only basis for alleging that this statement was intentionally false, however, was that he was not allowed to stay at Kellwood when She Knows!! was shut dawn (Pr. 800—801). Moreover, a statement as general as that alleged to have been made by Holding could not sustain Polin's

claim. Grant v. DCA Food Industries, Inc., 508 N.Y.S.2d 327, 328 (N.Y. App. Div. 1986), app. denied mem., 69 N.Y.2d 612 (1987) (no claim far fraud based on allegation that employer did not intend to honor oral promise to provide steady employment) . Once again, there is no evidence that Holding did not make attempts to assist Polin.

Polin also makes somewhat contradictory assertions regarding his employment that, on the one hand, he was not given the decision-making authority he was promised as President of She Knows!! (Tr. 574) and that, on the other hand, he was not supposed to have had production and sourcing responsibilities (Tr. 820). These assertions cannot be the basis f or a claim of fraudulent misrepresentation in June 1991. There is no question that Polin's responsibilities were altered after he began employment with Kellwood on July 22, when Golden pulled out of the venture, and Polin, rather than Golden, was named President (Tr. 825). Accordingly, this claim fails as well.

4. The Representation By Holding That Polin Would Receive Bonuses And Stock Options.

Prior to his acceptance of employment, Polin alleges that Holding promised him that he would receive bonuses and stack options (Tr. 323, 349). With respect to the bonuses, Polin was uncertain whether they would be based on the performance of his division or his own performance (Tr. 780). This is entirely consistent with Polin's written offer of employment letter, which tied his bonus to division performance (Exh. P-13). Thus, Holding's promise of a bonus was not a fraudulent one; Polin simply did not receive a bonus because of the performance of She Knows!!.

As for the stock options, Polin concedes that there were no specific numbers of options promised, nor were there any discussions concerning when or under what conditions the options would be available (Tr. 773-775). According to Thompson's handwritten notes of July 8, 1991 (Exh. P-6),

Chairman McKenna specifically advised Holding, among others, that stock options would be determined based on performance after a year. Thus, apparently Holding did have a basis for believing that stock options would be available, and he sought to secure such benefits on behalf of the She Knows!! executives. Again, simply because Polin did not receive the options does not make Holding's assurances to the contrary fraudulent.

5. The Representation By Holding That She Knows!! Would Be Kellwood's Only Junior Sportswear Division.

Finally, Polin contends that Holding falsely stated that She Knows!! would be Kellwood's first junior division (Tr. 311). Palm testified that this was false both because EnChante, another division of Kellwood, was manufacturing junior garments at the time, and because Kellwood purchased two other juniors manufacturers, A.J. Brandon and California Ivy, shortly thereafter (4/1/98 Holding Tr. 142-145; Tr. 556-558, 808).

Although EnChante did manufacture junior garments as of June 1991, that was clearly not its only market, as it also manufactured other products, including missys, childrens and dresses (Tr. 802) . One of Polin's witnesses, Barry Gussoff, testified that EnChante had an entirely different market from She Knows!!, as EnChante was known as a manufacturer of women's blouses and not as a competitor of She Knows!! (4/1/98 Gussoff Tr. 41). This was consistent with Holding's belief, according to Palm (Tr. 556-57, 801-808). Another Polin witness, Nancy Adelson Hauser, testified that Holding told her She Knows!! would be Kellwood's first start-up juniors division (4/2/98 Hauser Tr. 24, 27). There is no dispute that She Knows!! was unlike EnChante, in that it was the only Kellwood division exclusively devoted to juniors (Tr. 802, 805—806). consequently, Holding's representations to Polin were consistent with Holding's knowledge and belief.

The purchases of A.J. Brandon in December 1992 (4/1/98 Holding Tr. 139) and California Ivy in July 1992 (4/1/98 Holding Tr. 144) can have no bearing on Polin's claim arising over one year earlier. The discussions regarding the purchase of California Ivy were put "on the shelf" at the same time She Knows!! was put in place (4/1/98 Holding Tr. 143). Palm testified that he had no basis for alleging that Holding was aware of Kellwood's interest in either of these two companies as of June 1991 (Tr. 804).

Based on the above review of each of Polin's allegations, he did not carry his burden of proving that representations made to him by Kellwood representatives in order to induce him to work at Kellwood were intentional misrepresentations. Accordingly, this claim must be dismissed.

IV. TORTIOUS INTERFERENCE

The reason we dismissed this claim is that it was not proved. Tortious interference with contractual or employment relations requires a showing of intentional interference with such rights without legal justification. Polin's claim in this regard turns upon his contention that Harding intentionally undermined or sabotaged the She Knows!! operation with intent to damage Polin and She Knows!!, a part of Kellwood at all relevant times. The difficulties with this position based on the evidence of record are that (1) there is no showing of such tortious intent toward Polin or She Knows!!; (2) Harding assisted the Polin-She Knows!! venture in a number of ways at the times in question; (3) Harding's activities were not shown to be other than those which he conducted within the scope of his employment with Kellwood and as part of advancing Kellwood's business interests; (4) while Harding may indeed have been a tough businessman as to the events in question, and while it is arguable that he favored his own areas of responsibility at Kellwood Sportswear over those concerning She Knows!! for which he was assigned responsibility, it was not shown that was done otherwise

than in the normal course of business of Harding and Kellwood; (5) there is no third party as required by law, that is, the interests which Polin claims were interfered with were his business and employment interests with Kellwood; it does not seem to be legally possible for someone in Harding's position, or Kellwood standing in his shoes, to tortiously interfere with Polin's relationship with itself; and (6) while Harding may also have been engaged in seeking to advance his own interests within Kellwood as to the events at issue, the relevant case law holds that corporate infighting is not a basis for a conclusion of tortious interference.

What this case really involves under this heading is Polin's unhappiness at having had his employment with Kellwood severed. But he had no employment contract or legal right to continuing employment; the framing of the events at issue into a complaint alleging tortious interference is simply unfounded on the facts and at law. Thus while Polin asserts that Holding believed that Harding sabotaged the She Knows!! operation, Holding's testimony itself shows a partial contradiction as to whether he actually said that; even if he did, the other evidence of record does not objectively support a conclusion that Harding tortiously interfered with the She Knows!! operation in such a manner as to give rise to a cause of action on Polin's part. Palm was recognized as a top-notch salesman; the evidence clearly leads to the conclusion that he was not a very good businessman and that in attempting to run She Knows!!, he was in over his head, particularly after the defection from the ranks of Golden in July 1991. Polin's position is long on argument and short on facts. His argument, f or example, that the orders he booked constituted contracts with which Kellwood tortiously interfered is unsupported by the facts and contrary to the law. Polin himself had a good deal to do with the failure of She Knows!! with substantial lasses in a short period of time. There is no question that the She Knows!! venture started with high hopes and plans for future success; but it went sour. Polin lost his position at Kellwood as a result of those eventualities.

Again, Polin's contention that Harding exceeded the scope of his authority with Kellwood is long on argument and short on facts. Nor is there any claim or evidence of retaliation by Kellwood against Polin. Polin even goes so far as to argue that Kellwood's request for an award of attorneys' fees evidences malice toward Polin. Polin would even have the Panel read the Agreement to Arbitrate as completely one-sided as to counsel fees, that is, as related only to claims raised by Palm in this case. Aside from the fact that Kellwood had no knowledge of such a claim by Kellwood until these proceedings eventuated, that allegation would, if sustained, raise a lack of mutuality in the Agreement to Arbitrate which one would be reluctant indeed to conclude represented the shared intent of the parties. The applicable rules and the other language of the Agreement to Arbitrate clearly contradict such a contention.

As stated, there is no third party as to whom Polin's contractual relations could have been interfered with by Kellwood. And as to interference with employment relations, that relates to Polin's employment with Kellwood.

Polin went to the extent of misstating Celona's testimony, permitted by the Panel via an offer of proof by the Panel based on representations by Polin's attorney which did not materialize at all when Celona did testify. That goes to the contention that Celona would testify that Holding had indicated he believed Harding was intent on sabotaging She Knows!!. (See Polin's Memorandum of Law at 48; see also the discussion of the false offer of proof as to Celona which appears in this Opinion, below.) Indeed, it was Polin who testified that Holding indicated to him that in Holding's opinion, Harding was deliberately sabotaging "our operation," that he was not getting any cooperation (Tr. 392). In fact, Celona testified that he and Polin made many of the decisions that led to the problems, i.e. the decision to ship in Fall, 1991, and the decision to sell a more extensive line (Tr. 1977, 2006-2007).

Nor is there evidence to support Polin's contention that Kellwood "surreptitiously undermin[ed] Polin" (Polin's Memorandum at 51); the "surreptitious" allegations appear more to indicate a lack of evidence than proof of some conspiracy against Polin. Polin welcomed the opportunity to work f or Kellwood; Kellwood envisioned that She Knows!! would be a successful division; the failure was due to a number of factors, but not to intentional interference with Polin's contractual relations by Harding or, by legal attribution, by Kellwood. The "prospective business advantage" to which Polin refers (Memorandum at 39) is business advantage with Kellwood. Nor is there any sufficient basis for a finding consistent with Polin's contention that Harding acted outside the scope of his authority as to She Knows!! (Polin's Memorandum at 42). Polin's arguments on this heading are more a rehash of conclusions which lack evidentiary basis and of citations which arguably could support a finding if the proper factual foundation were present, than they are anything else. Harding was President of Kellwood Sportswear at the applicable times, the evidence shows that he acted as such to favor the interests of the division of which he was President and of Kellwood, and not always to the benefit of She Knows!!, but not that he acted with malice to harm She Knows!!.

The testimony of LaRizza, a rebuttal witness for Polin, supports that view; LaRizza was sure that there were instances where Harding made an executive decision where there was more dollar value and more impact involved (Tr. 2022). Celona testified to the same effect (Tr. 2022).

It is not necessary to burden and lengthen this Opinion with more extensive citations to misrepresentations of the record and of what happened by Polin and by his counsel; suffice it to say that Polin's testimony itself showed more than a little lack of credibility as to the events that occurred. Harding did not become officially responsible for She Knows!! until Chairman McKenna directed him to become more involved

there in March 1992; but Polin resisted Harding's plan for She Knows!!. See Tr. 1600, Plaintiff's Exhibits 14A and 14B. Polin's disagreement with Harding's conduct of the business does not suffice to establish malice; see Tr. 1693 for Harding's testimony that he was trying to make what he had work.

The Panel notes that Holding testified that he did not know if he ever used the word "sabotaged," that Kellwood Sportswear was late as to the first Spring start-up season, that he was not happy about that because Sportswear was a Kellwood division, that he may have been upset about that; he did not feel that Sportswear was supporting She Knows!! as much as they could have; then he testified that he may have used the word "sabotage" about the Spring 1992 line. See Tr. 100—101.

Even if all that were to be taken as true, it would not prove Polin's claim of Kellwood's tortious interference; Polin's errors of judgment about the start-up of She Knows!! contributed to its demise. Without going through every item of evidence and every one of Polin's repetitions and contentions about "sabotage" by Harding, suffice it to say that the other evidence of record does not support Polin's position on this heading either. As a result of the failure of She Knows!!, Harding lost advantage at Kellwood; and he was reminded of the failure by McKenna on more than one occasion. Harding's own self—interest was damaged by She Knows!!'s demise. Where is the malice in that?

Even Polin cites the requirement that a claim of tortious interference involve business relations with a third party, citing Pergess v. Sharrock, 33 F.3d 134 (2d Cir. 1994); see Polin's post—hearing reply memorandum of January 11, 1999, at 42-43. Who were the third parties? They cannot have been the customers of Kellwood; Polin worked for Kellwood and so did Harding and Holding. Again, Polin goes so far as to argue that Kellwood's request for sanctions is "evidence of the continuing malice of Harding that has permeated this

proceeding." (Plaintiff's Reply Memorandum at 53). This just shows the extent to which Polin has reached in attempting to make out a claim for tortious interference that does not exist on the facts of this case.

Then again, Kellwood paid Polin through June 30, 1993, with severance payments through July 31st of that year, continued his fringe benefits, and recognized that Polin would open his own repping business as soon as possible; a memorandum from Polin was counter-signed by Kellwood on March 29, 1993 (see Defendant's Exhibit 60); that type of arrangement hardly indicates a rush to terminate Polin's employment with Kellwood or malice toward Polin. Polin's problem seems to be that he had no claim for continued employment at Kellwood after She Knows!! failed; he was an at-will employee and his business relationships at the time were encompassed within his employment at Kellwood. As to "ordinary corporate infighting," see Citicorp Retail Services, Inc. v. Wellinqton Mercantile Services, Inc., 455 N.Y.S.2d 98, N.Y. App. Div., 1982, at 100.

So there is a lack of showing of interference with contractual relations with a third party, a lack of showing of malice as to that contention or as to the contention of interference with employment relations, and a failure to show that in acting as he did, Harding conducted himself other than as an employee of Kellwood and President of one of its divisions.

What we have here is a claim for wrongful discharge, never asserted (much less shown to be meritorious), parading as a tortious interference claim; we have examined and re—examined the record and the memoranda of law and we can find no factual or legal basis on which to sustain the claim.

Put another way, in electing to plead a tortious interference claim, Polin took on a heavy burden of proof; there simply is not sufficient evidence in the record on which to find that Harding acted with "disinterested malevolence" or outside the scope of his authority. And so it goes; one could walk

through the record and briefs on this issue (as the Panel has done) over and over and just keep saying the same thing: This claim was not proved. As indicated below, the Panel considered this claim in connection with its Decision on Motion of October 14, 1998, but decided to permit it to remain in the case, after Wisehart's false representation as to what Celona would testify to.

If the Panel were to uphold this claim, it would be a classic instance of a bad decision making bad law.

The above discussion does not mean that Polin's tortious interference claim failed to receive open—minded consideration by the Panel. In fact, the opportunity for Celona's purported testimony to enter the record via Wisehart's offer of proof was extended by the Panel following Polin's having rested on the record. The Panel came into this case prepared to find for Polin if the evidence and the law so indicated; the Panel notes that She Knows!! encountered a number of "disappointments" (see Defendants' Exhibit 67), not all of which were attributable to Polin, but none of which amounted to a deliberate intent to injure Polin or his business interests. But repeated recitation of the same rubric of conclusory allegations, unsupported by factual evidence, and of legal citations assertedly supporting those allegations, cannot suffice to establish proof of a claim.

V. AGE DISCRIMINATION

Polin asserts that his departure from Kellwood in 1993 was caused by discrimination against him because of his age. The Panel dismissed that claim in its Decision on Motion of October 14, 1998, and incorporated that dismissal into its Award dated February 8, 1999. Arbitrator Freeman noted his dissent.

We dismissed that claim because there was no evidence to support it. We found it to be frivolous, and sanctioned Polin and his counsel for litigating it, because of the absence of

evidence sufficient to constitute even a colorable claim of right as to this claim and because counsel who brought the claim, Mr. Wisehart, is chargeable with knowledge as to the lack of merit of a claim that he brought and pursued, whether it be in court or in arbitration. The pursuit of this claim without any factual justification on which to base it subjected Defendant Kellwood to the time, trouble and expense of defending against it, including trial and post-trial briefing. It also unduly prolonged the arbitration hearings.

The only basis for the assertion of such a claim which we can deduce from this record is an attempt to justify a claim f or counsel fees pursuant to the New York City Human Rights Law. But because the claim fails for lack of virtually any evidentiary support, the claim for fees fails as well. It cannot be reasonably inferred from the record at hand that this claim was brought in good faith. Aside from Polin's beliefs that Sherri Polivka of Kellwood is "youthful looking," Polin should have remained at Kellwood, and that he rather than Polivka should have headed up a continued She Knows!! operation, a claim which conflicts with the evidence of Polin's own part in bringing about the demise of She Knows!!, partly contained in the testimony of Polivka herself, there is simply no ground for a claim of age discrimination.

The apparent assertion that, based on her age, Polivka was assigned duties at EnChante (a Kellwood division) that Polin believes he should have been assigned, lacks any evideritiary support in the record. And the apparent belief of Polin's counsel that age discrimination is rampant in the industry (see Memorandum of Law at 30) hardly suffices to state a sustainable claim of discrimination against Polin because of his age. And that is what this claim is: An assertion that Polin was treated unfairly and unlawfully because of his age, disparate treatment age discrimination. That is the theory under which Polin pursued his case.

The statutes, whether the Age Discrimination in Employment Act, the New York State Human Rights Law, or the New York

City Human Rights Law, place the burden of proof of discrimination on the party claiming it, in this case, Plaintiff Polin. While Polin showed that he was within the protected class in that he was over the age of 40 at the time of the events in question, he has not met the other requirements of the discrimination statutes, that is, proof that he was qualified for the position which he argues now he should have received or maintained (president or manager of She Knows!! after it became a part of the EnChante division of Kellwood, and apparently, after it was discontinued), or proof that Kellwood's failure to retain him was motivated by age discrimination. The cases, including decisions by the Second Circuit, are clear on those requirements. Polin was hired at 43 and discharged at 45 years of age; there is no evidence in the record from which a trier of fact could have concluded that his age was the "but for" cause of his having been let go by Kellwood. See Owen v. Thermatool Corp., No. 97-9346, 1998 WL 557092 at *1 (2d Cir. 1998). And Harry Holding, 11 years older than Polin, hired and fired Polin within some two years or less, thus giving rise to a "same actor" defense on Kellwood's behalf.

When Kellwood transferred some of Polin's former responsibilities to Polivka (then 40 years of age) at the start of the consolidation of She Knows!! into Kellwood's EnChante in November 1992, that hardly showed that Polin was discriminated against because of age; in fact, his own shortcomings in managing She Knows!! are delineated in the record, including in the testimony of Polivka that there were pricing errors in the sale of goods which contributed to the demise of She Knows!!. The record shows other errors by Polin, an expert salesman who took on wide—ranging business responsibilities for She Knows!!, including sourcing and pricing, which the record shows were beyond his abilities. The contention of age discrimination is also rebutted by the fact that Polivka was 40 years old and thus in the same protected class. Polin never applied for the position which Polivka was assigned as president of the combined California Ivy/A.J. Brandon Division in 1995, two years after

the events at issue; Polin never made any claim of retaliation or of disparate impact age discrimination. And individuals other than Polin were terminated by or retired from Kellwood after their divisions lost money; in this case, Polin's division lost some $8 million in a time frame of two years or less.

Kellwood did not continue the She Knows!! venture; it shut it down; Polin was not replaced by a younger employee; his termination was not because of his age.

To be sure, the Panel would not condone a proved claim of age discrimination and would not hesitate to find for the Plaintiff if there were such evidence in the record. But there is not. And the absence of anything even resembling a claim for the Panel to determine based on evidence in the record on this heading makes the claim frivolous. It must be borne in mind that Kellwood had the obligation of paying the expenses of the arbitration pursuant to the February 25, 1998 Agreement to Arbitrate, a provision entered into pursuant to Attorney Wisehart's insistence. By making unfounded arguments and by insisting, contrary to the evidence, that proof of such a claim does exist, thus prolonging the hearings and causing Kellwood additional expense, Polin, by his attorney, Wisehart, engaged in frivolous conduct. There cannot be a finding based on this record of a good faith advancement and prosecution of a claim of age discrimination. There is no evidence that Polin's age was a motive in Kellwood's ending Polin's employment or that Kellwood offered pretextual reasons for age—based discrimination.

Thus Polin did not get past even the first stage of showing a prima facie case under the McDonnell Douglas analysis (McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Nor is there any basis for finding a difference in burden of proof between Title VII and the ADEA, or between Federal, State and City law as to proof of age discrimination. There is no evidence on which it may fairly be concluded that Polin

proved such a case. Polin's employment with Kellwood ended effective June 30, 1993; he officially began that employment on July 22, 1991.

There is no evidence that anyone was preferred over Polin because that person was younger than he; there is no explanation of how Kellwood's view of Polin changed so radically in the short time that Polin worked for Kellwood on a basis having to do with Polin's age. To be sure, Kellwood made the decision not to continue with Polin, but Holding, who made the determination that he could not offer Polin another opportunity to remain at Kellwood (in 1993), was also a member of the age— protected class; why he would have discriminated against Polin on the basis of Polin's age is unexplained in the record. Nor does Polin claim that Kellwood failed to rehire him after his termination for discriminatory reasons.

Polin relies heavily on his Exhibit 25; the Panel has considered that exhibit and the arguments concerning it, but does not find that it supports Plaintiff's position that Polivka and Harding deprived Polin of his position because of his age or that Kellwood utilized Polivka to conceal Harding's maneuvering as allegedly shown in that exhibit (Plaintiff's Memorandum of Law at 30)

VI. AWARD OF SANCTIONS AGAINST ARTHUR WISEHART, COUNSEL FOR POLIN.

In the Panel's award of February 8, 1999, the Panel assessed one—half of the cost of the arbitration, excluding witness fees, against counsel for Polin, Arthur Wisehart, on two grounds: misconduct in connection with litigating a frivolous age discrimination claim, unduly prolonging the hearings, unjustly accusing Kellwood and its counsel of misconduct and making a false offer of proof with respect to Paul Celona; and contempt of the Panel, based on the submission to the American Arbitration Association of false and unsubstantiated statements regarding the Panel Chair. We set

forth the legal authority for these sanctions, as well as the factual bases therefore, below.

A. Legal Authority For Award of Sanctions.

Pursuant to the Agreement to Arbitrate Dispute, executed by the parties on February 25, 1998, the instant arbitration was subject both to the terms of that Agreement and to the National Rules for the Resolution of Employment Disputes of the American Arbitration Association (the "AAA Rules"). (Agreement, ¶ 1). In the event of a conflict between the Agreement and the Rules, the Agreement would control. Id.

Under the Rules, the Panel has the authority to "grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court. (Rule 32(c) of the AAA Rules). Moreover, the Rules expressly provide for the award of attorneys' fees: "The arbitrator shall have the authority to provide for the reimbursement of representative's fees, in whole or in part, as part of the remedy, in accordance with applicable law." (Rule 32(d) of the AAA Rules). Accordingly, the Panel has discretion to award appropriate relief under the circumstances of this case pursuant to the AAA Rules.

As noted above, the Rules incorporate "applicable law," and permit the same remedies "had the matter been heard in court." The Agreement also contemplates that the Panel has the authority to "provide whatever remedies are currently available under law . . ." (Agreement, ¶ 7). Federal Courts generally have equitable powers to award sanctions when counsel has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." First National Supermarkets, Inc. v. Retail, Wholesale and Chain Store Food Employees Union Local 338, 118 F.3d 892, 898 (2d Cir. 1997); Morley v. Ciba-Geigy Corp., 66 F.3d 21, 24 (2d Cir. 1995). Rule 11 of the Federal Rules of Civil Procedure also provides authority to impose sanctions against parties and/or attorneys for the

filing and continued pursuit of frivolous or wholly unsupported claims. Finally, the New York City Human Rights Law ("NYCHRL") permits the award of attorneys' fees and costs to the prevailing party in Polin's age discrimination suit, which was Kellwood. For all these reasons, the Panel believes that it has the legal authority to assess sanctions against Wisehart.

In addition, the Panel believes that it has an obligation to protect the forum. If the type of conduct engaged in by Wisehart were permitted to go unremedied, resort to arbitration to resolve employment discrimination and related claims would be discouraged. That is because parties know that a Federal Judge would be most unlikely to condone the kind of conduct in which Wisehart engaged; his approach to arbitration appears to have been that, since the arbitrators were not judges, "anything goes." The purpose of arbitration procedure in a case like this is to afford the parties the full protections of fairness, due process and orderly and expeditious procedure which they would expect were they in court. Thus, the benefits of savings in time, selection of the decision—makers by the parties, and an enormous savings in cost over extended litigation in court, can be fully realized. If an attorney were free to disregard and flaunt the authority of the arbitral forum, those benefits would be lost; the interest of the Federal and other courts in following the national policy of promoting arbitration is a means of resolving disputes would be frustrated.

B. Factual Bases For Assessment of Sanctions.

1. Attorney Misconduct.

The record is replete with numerous examples of unprofessional and unethical behavior by Wisehart, including both false accusations and false representations. Any one of these examples could have been the basis for sanctions; when combined, they present a picture of an attorney who apparently believed that he was not bound by any rules of

professional conduct, either toward the Panel or opposing counsel.

a. False Offer of Proof of Celona.

At the conclusion of the presentation of his case in chief on August 7, 1998, Wisehart agreed that he had presented all the witnesses he wished to present, subject to exceptions on the Panel's rulings (Tr. 1364—5). Nonetheless, as soon as counsel for Kellwood announced his intention to file a motion for judgment, Wisehart immediately complained that he was being treated unfairly because he wished to call Paul Celona, but did not because of the time constraints placed on him (Tr. 1392). The Panel reminded Wisehart that he had never been precluded from calling Celona in his case in chief (Tr. 729—30, 1393). Moreover, the parties had specifically agreed that the arbitration proceedings would not extend beyond 13 days of hearings, to conclude by October 30, 1998 (Tr. 236). Nonetheless, in an effort to be scrupulously fair, the Panel held a conference call on August 14th to permit Wisehart to present an offer of proof as to Celona and another potential witness, Sherri Polivka.

During the conference call, Wisehart represented to the Panel that Celona would testify that Harding refused to supply pants from Rutherford, and that Holding accused Harding of "sabotaging" She Knows!! (Tr. 1413—1415). Celona allegedly also would testify that Kellwood Sportswear, located in Rutherford, either would not supply samples or patterns or that such samples or patterns were incorrect (Tr. 1412). Celona would testify that Rutherford did not want to understand the juniors market, and he obtained no responses to his requests for information and assistance (Tr. 1412—1413). Wisehart also stated that Celona would testify that Tim November, a Rutherford scheduler, specifically told him that the goods were available, but Harding would not allow them to be shipped (Tr. 1416). According to Wisehart, Celona would also state that November told him he could not do anything about the

problem because he had to live with Harding, and he was frightened of Harding because of his position. Id. The Panel accepted this offer of proof (Tr. 1468), and considered it as part of Polin's direct case.

When determining Kellwood's motion for judgment on partial findings, the Panel assumed Wisehart's representations to be accurate, which were material factors in the Panel's decision to deny Kellwood's motion with respect to the tortious interference claim. In this offer of proof, there appeared to be
potential evidence of an intentional campaign by Rutherford to harm She Knows!! by providing no assistance, samples or deliveries upon request, and by its refusal to adjust to the juniors market. Consequently, the parties returned to New York for hearings on October 26th, 27th and 28th to hear testimony in connection with the remaining claim.

On October 28, 1998, Celona testified, and his testimony was at significant variance from Wisehart's representations. First, Celona testified that he had no personal conversation with November, but was part of a sales group conference call, at which November simply stated that Harding determines which customer gets shipped deliveries (Tr. 1992). Celona did not testify as to any of the statements that Wisehart had represented November allegedly told Celona. Second, Celona testified that Holding did not believe that Harding was giving She Knows!! adequate support or attention (Tr. 1984), but he made no mention of intentional "sabotage." Third, far from testifying that Rutherford gave no assistance or support, Celona testified at length that he worked with Rutherford to work out fit problems (Tr. 1971) and sample problems (Tr. 1975), and that She Knows!! was permitted, with Harding's endorsement, to hire a pattern maker, Ed Jenkins, to speed the process and provide better customer response (Tr. 1976, 2012). He also testified that it was She Knows!!'s decision to sell a far more extensive line than simply the loafer pant, which was beyond Rutherford's ability, was not consistent with the original business plan outlined in July, 1991, and

which required import sourcing (Tr. 1977, 2006—2007). It was also She Knows!!'s decision to try to produce a line for late fall, 1991, which led to production problems (Tr. 2006). Finally, and significantly, Celona testified that Harding's decisions to ship one customer rather than another was simply a "senior management decision" to obtain the best "impact" of the available resources (Tr. 2022).

Celona's testimony, then, presented the opposite picture than had been described by Wisehart. Rather than intentional sabotage and refusals to assist, there were substantial efforts by Rutherford to work with She Knows!! and difficult management decisions to allocate resources. Rather than showing the destruction of She Knows!! by actions of Harding, Celona testified that She Knows!! sowed its own seeds of destruction, by changing the business plan to seek earlier deliveries of far more extensive lines. Had Celona's testimony been represented accurately by Wisehart, there would have been a substantial possibility that the tortious interference claim might have been dismissed, thus obviating the need for three additional days of hearing. Wisehart's false representations in this regard misled the Panel, were a serious breach of professional responsibility, and may well have led to significant increased expense to Kellwood.fn4

b. False Accusations and Other Improper Conduct.

Aside from Wisehart's accusations against the Panel Chair, which will be set forth below, he repeatedly and without any factual foundation, falsely accused Kellwood and its counsel of inappropriate and unethical behavior, in an attempt to persuade the Panel to treat him or his client more favorably. On three different occasions, Wisehart accused Wall of improperly contacting non—party witnesses and demanded Wall's notes of his conversations. During the testimony of Barry Gussoff, Wisehart alleged that Wall and/or Kellwood "put the heat on" Alan Ziskin, to pressure him not to testify (4/1/98 Gussoff Tr. 37—41). Wisehart complained that Wall somehow "interfered" with Gussoff as well, by calling him to

ask questions about the case (Id. at 37). During the testimony of Jeffrey Levy, Wisehart accused Wall of interfering with his testimony by telephoning him (4/3/98 Levy Tr. at 63-66). Wisehart also falsely stated in a letter dated August 19, 1998, that Wall contacted Celona on numerous occasions, that Celona objected to these calls and that Celona refused to speak to Wall without Wisehart's presence. Wall stated on the record that he simply left a voicemail for Celona on a single occasion (Sanctions Tr. at 54).

Each of these accusations, apparently designed to intimidate Kellwood and/or influence the Panel, were either false or not the basis for any allegation of improper conduct by Wall. There was no prohibition against Wall contacting a non—party, non—expert potential witness in order to prepare for the hearings. Wisehart's suggestions to the contrary were wholly inappropriate.

Wisehart also accused Kellwood of destroying evidence and maintaining false financial records. He stated that the She Knows!! balance sheets were "obviously manufactured document[s]." (Tr. 436). He provided no support for this serious allegation. Wisehart also alleged that Kellwood deliberately destroyed evidence, i.e., several bolts of cloth and product samples, which indeed were not relevant to the case, and were disposed of after unrelated litigation was settled (9/18/98 Conf. Tr. 16).

In an astounding display of improper conduct, Wisehart had a court reporter tape and transcribe a telephone conference on May 28, 1998 with Panel Chair Liebowitz and Wall, without either party's permission or without even informing the other parties to the conversation of his actions. Such behavior was not only unethical, it would be considered illegal in many states.

c. Undue Prolonging of Hearings.

There were ten and one half days of testimony in this case, nine of which were devoted to Polin's case in chief or his

rebuttal. The incredibly time-consuming nature of this proceeding was due in large part to Wisehart's prosecution of the case. In addition to the constant repetition of questions and reiteration of the same areas of inquiry, Wisehart continuously interposed spurious objections and utilized other tactics that unduly prolonged the proceedings. Included among these actions were:

(i) Objecting during Wall's opening statement that Wall should not be permitted to utilize a demonstrative time line exhibit (4/1/98 Holding Tr. 36—37);

(ii) Seeking to have Mrs. Polin's physician testify as to the impact of Mrs. Polin's health on Polin's business venture, despite the failure to disclose such testimony in Polin's Pretrial Memorandum (4/1/98 Gussoff Tr. 37—38);

(iii) Serving pleadings on Saturday morning before a Monday hearing date to require the use of a different court reporter, and bringing his own court reporter to the hearing without authorization (Tr. 5, 10);

(iv) Seeking to have his expert, James Leonard, testify during Polin's case in chief as to the profit and loss statements of Kellwood, after having identified Leonard as an expert only as to Polin's lost earnings (Tr. 190—193, 443—444);

(v) Agreeing to a time limitation as to the length of hearings, and then asserting that such an agreement was forced upon him (Tr. 1386, 1392, 1395; 9/18/98 Conf. Tr. 32—33);

(vi) Continuously leading his own witnesses on direct examination, to the point where he appeared to be intentionally ignoring the repeated admonitions of the Panel, which finally had to preclude any follow-up questions to a leading question (Tr. 342, 1883—1886, 1889—1890, 1893, 1910, 1916, 1920, 1926—27, 1938, 1939, 1969);

(vii) Providing repetitious questioning and seeking duplicative testimony despite Panel rulings to cease (Tr. 1665, 1685—86, 1708—1709, 1715);

(viii) Seeking to have Kellwood pay for expedited transcripts, rather than normal delivery, and continuing in his demand after the Panel had ruled (8/14/98 Conf. Tr. 1470—1476; 10/21/98 Conf. Tr. 4—17) ;

(ix) Subpoenaing Celona as a witness in Polin's case in chief after Wisehart had already rested and the Panel had accepted his offer of proof (9/18/98 Conf. Tr. 4—31); and

(x) Submitting a dispute to the American Arbitration Association when the arbitration was by private agreement and the Association had no jurisdiction over the matter. Wisehart was fully aware of such lack of jurisdiction (10/21/98 Conf. Tr. 39).

All of these actions delayed the hearings and caused additional expense to Kellwood. They constituted unprofessional behavior and serve as a basis for sanctions against Wisehart.

d. Frivolous Age Discrimination Claim.

The Panel has set forth above its discussion as to the merits of Polin's age discrimination claim. Suffice it to say that there was absolutely no basis for litigating an age discrimination claim by a plaintiff hired at age 43 and terminated two years later, with not an iota of evidence that a similarly situated younger employee was treated preferentially to Polin. Given the years of discovery and the length of the proceedings in this matter, it was unreasonable that Wisehart would continue to pursue this claim in the absence of any evidentiary support. This is a clear case for Rule 11 sanctions, as well as the award of attorney's fees to Kellwood as the prevailing party under the NYCHRL. NYCHRL Section 8-502(f). The award is necessary to demonstrate that

frivolous claims brought, it appears, primarily to force a settlement may not be countenanced.

2. Contempt of the Panel.

The Panel also assessed fees and expenses against Wisehart because of his submission to the American Arbitration Association ("AAA") of written, false and unsubstantiated statements concerning the Panel Chair, by letter dated October 23, 1998 (the "AAA Letter"). Arbitrators' Exhibit A, copy attached. In the AAA Letter, Wisehart made the following accusations:

1. Panel Chair Liebowitz threatened to abandon the case and would decline to decide the dispute unless Wisehart agreed that he received a fair hearing;

2. Panel Chair Liebowitz had demonstrated that he was no longer "neutral" but a partisan, based on a telephonic hearing on October 21, 1998;

3. Panel Chair Liebowitz improperly received payments from Defendants, and threatened to desist from participation if timely payment were not received;

4. Panel Chair Liebowitz was unfair to Polin because he would not order daily transcripts of the proceedings;

5. Panel Chair Liebowitz's rulings were influenced by Kellwood's ability to withhold and delay payment;

6. Panel Chair Liebowitz would not agree to an extension of the proceedings because of concern of payment by Kellwood.

The AAA Letter was hand-delivered to the AAA on Friday, October 23rd, and received by Wall and the Panel on Saturday, October 24th. At the commencement of the proceedings on Monday, October 26th, the Panel advised

Wisehart that it intended to hold hearing on sanctions with respect to the AAA Letter, at the conclusion of the testimony (Tr. 1531-2). When the testimony concluded on Wednesday, October 28th, Wisehart objected to proceeding with the sanctions hearing, because his personal counsel wanted several weeks to prepare (Sanctions Tr. 6). Out of courtesy to Wisehart and his counsel, the proceedings were postponed until the following day.

On Thursday, October 29, 1998, the Panel afforded Wisehart the opportunity to explain the factual basis underlying the serious allegations contained in the letter to the AAA. He declined to do so (Sanctions Tr. 30—31, 62). After hearing argument from Wall and Wisehart's attorney, the hearing was closed.

Based on the Panel's review of the record and its recollection of the events at issue, the Panel finds the AAA Letter to contain outright falsehoods and to be a serious breach of professional ethics. Wisehart essentially accused Panel Chair Liebowitz of being improperly and unethically influenced by Kellwood's payment of fees. This is a direct attack on the Panel Chair's character and integrity, submitted to the institution which, in large part, controls his livelihood as a full-time arbitrator. Wisehart had no basis for making these statements, which were essentially designed to oust the Panel Chair from the proceedings, apparently because Wisehart believed that the Chair was not looking favorably upon his claims. At the time the letter was submitted, two of Polin's three claims had been dismissed. Had Panel Chair Liebowitz recused himself, Wisehart might have had the opportunity to retry the entire case, at substantial expense and to the detriment of Kellwood. To besmirch the good name of a highly respected arbitrator, without any factual foundation, simply for potential tactical advantage, was unconscionable.

The allegations of the letter were clearly false and known by Wisehart to be false. Panel Chair Liebowitz never stated that

he would resign unless Wisehart agreed he received a fair hearing, nor did he threaten to resign if he did not receive payment. At no time did Panel Chair Liebowitz provide any basis for an assertion that he was influenced by Kellwood's payment of fees; to the contrary, both of the other Panel members, including the member selected by Wisehart, agreed that Panel Chair Liebowitz had been impartial and, according to member Freeman, had attempted to give Polin every opportunity to present his case (Sanctions Tr. 78-81). The only reason Panel Chair Liebowitz was paid by Kellwood, rather than by both Polin and Kellwood, is that Wisehart insisted on such an arrangement as a condition to agree to arbitration (Agreement ¶ 8.2). Moreover, all decisions of the Panel were made by consensus, including the decision with respect to daily transcripts. The conference call on October 21, 1998 related to Wisehart's subpoenas of witnesses and documents as well as his request for daily transcripts, and there was no evidence during that call of any improper behavior by the Panel Chair. Finally, as noted above, the time limitations on the hearings were specifically agreed to by Wisehart and Panel Chair Liebowitz was merely honoring the agreement of the parties in declining to permit the proceedings to last beyond October 30, 1998.

For the foregoing reasons, the Panel finds that Wisehart's actions constituted misconduct, were in bad faith, vexatious and in contempt of the Panel. Accordingly, sanctions were assessed against him in the amount of one—half the fees and expenses, excluding witness fees, incurred by Kellwood.
Dated: April 10,1999

Jonathan S. Liebowitz, Esquire Chair
Kenneth D. Kleinman, Esquire Member
Martin Freeman Member

Footnotes

fn1 Panel member Freeman dissented on the Panel's dismissal of the fraudulent inducement and age discrimination claims.

fn2 As can be seen from this transcript cite, Polin testified he was given this memorandum on June 20. Thus, Panel Member Freeman's spirited dissent, based in large part on this memorandum, is puzzling. Far from trying to hide the information in order to support a fraudulent intent, as contended by Member Freeman, Holding voluntarily provided it to Polin at the very meeting at which Polin accepted employment.

fn3 It is possible that Enoch Harding knew of the potential production problems as of early July 1991, because the July 16, 1991 memorandum was forwarded to him and there is a reference to a business plan by Harding in notes dated July 9, 1991 (Exh. P-6). This evidence, however, postdates Polin's acceptance of the position in mid- to late June 1991. In addition, Polin presented no testimony in his case in chief as to any statements by Harding that induced him to accept the position. Indeed, although Polin chose to call a number of witnesses from Kellwood as if on cross in his case in chief, he did not do so with Harding.

fn4 Indeed, Wisehart also misrepresented the testimony of Polivka, although this had no impact on the Panel's decision, because the Panel rejected his offer of proof as to her. Nonetheless, her testimony, as shown by the Panel's discussion of the tortious interference claim, demonstrate the lack of merit of that claim, rather than being supportive of Polin's position.

Member, Freeman submits the following dissent as to the fraudulent inducement claim:

Dissent on the matter of fraud in the inducement

Although I defer to my colleagues on matters of law, I would hope they would reciprocally defer to me on matters of industry practice. I preface with this because I do not feel those areas oppose one another in the matter of fraud in the inducement. Once they have a better grasp of the industry and the sequence of events and actions (or inaction) as outlined in evidence presented, they will be justified in reconsidering the dismissal of the fraud in the inducement claim. I will address the linchpin of the dismissal (that Mr. Polin accepted a position on 6/14/91).

I will use three time frames 1–Mr. Holding from September 90 through June 16,91 2—Mr. Holding from 6/17/91 to 7/22/91 3-other participants and events.

Harry Holding testified that he first spoke to Kellwood in October of 1990 about the possibility of doing something with them. He also stated that he suggested that they buy Hartwell, his present employer. He then had discussions in December and again in February. In February, he found out that they would not buy Hartwell. In March he was given an offer to come to Kellwood and in April he agreed to do so starting on June 17, 1991 to build another Hartwell. He has repeatedly denied this or any other discussion about any venture such as this until after he started in June. The new "Hartwell" for Kellwood would determine his success at Kellwood. During the December and February meetings there was talk of the possibility of Mr. Holding perhaps succeeding Mr. McKenna as president of Kellwood if he decided to give up that title. On 6/5/91 Mr. Holding initiates a call to Mr. Golden, has a discussion with him and asks to be transferred to Mr. Polin. They have a discussion and Mr. Polin is told a brief sketch of Holding's plans. They talk a few more times in the next several days and Polin requests Holding meet Polin

in Atlanta to further discuss in greater detail the plan. Mr. Polin was to be in Atlanta for a social function and Mr. Holding was there to pack up and prepare to move to St. Louis to start his new job on 6/17/91. At the meeting on the 14th of June Holding lays out for Polin the dream situation. He discusses with Polin the ability of Kellwood to domestically make a quality product, priced competitively, and the ability to turn goods quickly and to maximize sales. All the things to make a salesman or sales manager salivate. Polin expresses great interest in the concept. He was willing to make a move based on the concept being as described. Polin resigned from Palmettos around July 1, 1991.

2–Holding starts 6/17/91. Holding has insisted in his testimony that he has not discussed anything with anyone because he supposedly did not know what he would be doing for Kellwood until he got there. Of course by mere coincidence within one week of his starting he has purchased 11 styles of Hartwell goods had them checked and by June 24th has the costs done for domestic, Dominican Republic, and Mexico production. Quite remarkable when he had no idea he would be doing this until after he started. So at least Holding knew that offshore production was being considered at the end of his first week at Kellwood. For anyone to believe this was shown Mr. Golden and Mr. Polin the evening they had dinner on June 20 is a reach. The handwritten document was obviously done on the 24th. Our next piece of evidence might be the most important part of the puzzle. Exhibit D4 produced over perhaps a week to ten days was basically a collaboration of Holding and Dean Thompson. In this report titled Cheenos and Parsons Place Separates Proposal it is clearly stated that production would be 75% offshore. The proposal also notes that Holding has contacts to bring the entire sales and merchandising team for both junior and missy separates. In Holding's testimony we learn that he didn't have the contacts, but Polin did. It was vital to Holding that he have Polin's contacts to make this work and he knew that Polin would not come on board if there was not domestic product. As an aside let us realize this document

was title a PROPOSAL!!!!! We also discover in D4 that projection for both the missy and the junior areas would be 25 million each. With the juniors they saw licensing possibilities for kids and swimsuits. We also find in D4 mentioned a study titled Activity Based Costing Project. We have pointed out in D4 how the margins of the new areas would be better than those that were involved in the study and would help Kellwoods net profit. To suggest Holding was not aware is impossible. And once again Holding knew that Polin must not find out about this. He probably knew this before Polin even resigned at Palmettos. So Holding at no time told Polin that most product would be offshore. Mr. Holding in D4 even recommends who should be used for import knits. Holding knew this was the business he was hired for, and if he didn't have Polin and the people he could bring, Kellwood would have no use for him. And the proof of that is when this fell apart they didn't want him for anything else. Sure they let him hand around for an extra 20 odd months, but you recall his testimony that he really did nothing during that period. That information was corroborated by Hal Upbin's testimony. He stated that he told Holding to retire or be fired. He also stated that his performance was not sterling, and further added they did not replace him. On 7/16 another document showed that Kellwood schedule for Spring season should have started the beginning of June if your spring shipping was to be timely. They were seven weeks behind before they started.

Now to the crux of the matter, Mr. Kleinman has stated that the discrepancies of when Polin and Holding first spoke is not material. I believe it is of great import. If two people disagree, one of them is lying, and that should determine credibility. If we determine that Holding is truthful how could Polin have made a commitment to anything on 6/14 when Holding denies having discussed with anyone until he found out about when he started working. I don't believe any one buys that. What is the saying? If I remember it correctly the legal term is "falsi in unum, falsi in omnibus". To lie about one thing, to lie about all things. If I could make you

understand how important domestic production is over the last 15 years in the industry, when imports have taken so much business, orient goods need 90 days, 807 goods are cut in the U.S. boated to the Caribbean country or Latin America, sewn there, boated back, clear customs and go the warehouse for shipping. Domestic goods get sewn in your own factories, go to your warehouse and ship. Interestingly enough had Polin even known in mid July he would have accepted Mr. Worsley's offer to come back to Palmettos. That offer was good until he went to work for Kellwood on 7/22/91. I ask you how much more than someone deliberately lying, knowing full well that if he told the truth he would not have the man he desperately needed to make this work. What more must one show to prove fraud in the inducement? How can you justify a 6/14/91 date when he has stated he didn't discuss this with Polin at that time? How can you have it both ways? You accept what Polin says of 6/14 and you are not willing to believe that Holding is lying about everything else. I am sorry. I can't accept this. clearly one of the two parties has lied. We all know which one it is!! This flood of lies in testimony is the same as the lies to Polin to induce Polin to join the company. By any name that is fraud!!

Martin Freeman, Member

By Hand

October 23, 1998

American Arbitration Association
1633 Broadway, 10th Floor
New York, New York 10019

Re: Polin v. Kellwood, et al.,
Civil Action No. 93-Civ-7876 (RO),
American Arbitration Association,
ARBITRATORS: Jonathan S. Liebowitz, Esq.,
Mr. Martin Freeman, Kenneth D. Kleinman, Esq.

REQUEST FOR INTERPRETATION AND APPLICATION OF NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES

1. On behalf of Charles S. Polin, the plaintiff in an arbitration proceeding that is being conducted subject to the National Rules for the Resolution of Employment Disputes of the American Arbitration Association, a ruling upon issues involving the interpretation of and application of said Rules is respectfully pursuant to paragraph 40 thereof, which provides in pertinent part that "All other procedures shall be interpreted and applied by the AAA."

2. The Agreement to Arbitrate the Dispute dated February 25, 1998, is annexed hereto as Exhibit A.

3. The Arbitration Agreement provides that there are two partisan arbitrators and a neutral arbitrator. The neutral arbitrator is designated to be Jonathan S. Liebowitz, Esq., as stated in paragraph 4 of the Agreement.

4. Arbitration hearings have been conducted on the following dates: April 1, 1998; April 2, 1998; April 3, 1998; June 1, 1998; June 2, 1998; August 5, 1998; August 6, 1998; and August 7, 1998.

5. Further hearings are scheduled for next week, from October 26, 1998, through October 30, 1998.

6. The issue presented is that the neutral referee has threatened to abandon the performance of his function in this proceeding.

7. The Arbitration Agreement provides (Exhibit A ¶ 4):

"In the event that the neutral arbitrator is subsequently unable to serve and resigns, the parties agree to attempt to designate jointly an alternative 'neutral' arbitrator within the thirty (30) day period following the initial neutral's resignation. Failing such agreement, the parties agree that they shall jointly petition the American Arbitration Association to select a 'neutral' arbitrator in accordance with the Rules."

8. In an off-the-record discussion on August 7, 1998, the neutral arbitrator stated to counsel that, at the conclusion of the hearings that have been scheduled for next week he intends to inquire whether counsel have received a fair hearing.

9. The neutral referee further stated that if counsel for Mr. Polin states that he has not received a fair hearing, he will abandon the case and will decline to decide the dispute to be arbitrated.

10. The neutral arbitrator already is well aware that the undersigned as counsel for Mr. Polin does not believe that he has received a fair hearing consistent with the Due Process Protocol of the AAA. This became apparent at a telephonic hearing on October 21, 1998, on plaintiff's requests to subpoena certain witnesses for the presentation of plaintiff's rebuttal case. The transcript of the telephonic conference will be submitted as soon as it is available from the Court Reporter because it will demonstrate that the arbitrator can no longer be fairly considered to be "neutral," but has himself

become a partisan.

11. The neutral arbitrator's off-the-record threat to decline to decide the case unless plaintiff waives his fair hearing and due process rights is violative of the National Rules, the Due Process Protocol, and also the Federal Arbitration Act, 9 U.S.C. §§ 10, 11, which is made applicable by the arbitration act (Exhibit A, ¶ 2), 9 U.S.C. § 10(a)(1)(2)(3) provides as follows in pertinent part:

"(1) Where the award was procured by corruption, fraud, or undue means.

"(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

"(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." (Emphasis added.)

12. It is submitted that it is a violation of the National Rules and the Due Process Protocol of the AAA for the neutral arbitrator to threaten to walk away from a pending arbitration proceeding unless a party waives his right to object that a fair hearing was not conducted.

13. Such a threat, particularly when made off the record, is a perversion of the arbitration process and the National Rules.

14. The importance of an interpretation of this issue is that the resources of Mr. Polin, the plaintiff, are known to be extremely limited, and the expenses incurred by him in connection with the prosecution of this arbitration to date constitute an extremely important commitment of time and resources on his part.

15. The problem is aggravated by the fact that contrary to paragraph 38 of the National Rules for the Resolution of Employment Disputes, entitled "Neutral Arbitrator's Compensation," the defendants have been making payments directly to the neutral arbitrator, by-passing the American Arbitration Association, a procedure that is objectionable.

16. Previously, because defendants had delayed payment the neutral arbitrator threatened to desist from any further participation in the arbitration. Since then, the payments have been made by Kellwood in the form of ex parte billing statements and that have not been made available to us.

17. The neutral referee has refused to order defendants to make available transcripts of the hearings next week on a daily basis that are urgently needed by the plaintiff for the preparation of his rebuttal case, even the Arbitration Agreement requires defendants to pay all such costs.

18. The neutral arbitrator has stated that Mr. Polin will be required to pay the costs although he knows full well that Mr. Polin is financially unable to do so.

19. The neutral arbitrator's ruling on this and other procedural matters is believed to be influenced by Kellwood's ability to withhold or delay payments to the neutral arbitrator if Kellwood disagrees with his rulings.

20. The problem is aggravated by the fact that the defendants may not be scheduled after the end of next week on the basis of merely an oral scheduling agreement that defendants seek to use to veto further proceedings there has been a material change in circumstances making such an extension of time necessary in order for the plaintiff to present a rebuttal case.

21. The Arbitration Agreement does not contain any such time limitation, and it has not been amended by any such written agreement limiting hearings.

22. However, it is clear that the defendants would withhold any further payments to the neutral arbitrator as a means of coercing him into desisting from granting such additional time necessary to complete the arbitration.

23. Such a tactic is contrary to the National Rules and the Due Process Protocol, under which it provided that the arbitrator may postpone hearings for good cause shown as provided in paragraph 17, and the further provision that if there is a vacancy, the American Arbitration Association may fill the vacancy in accordance with the applicable provision of the National Rules so that the award can be rendered, as provided in paragraph 13.

WHEREFORE, rulings are respectfully requested on the issues discussed above.

It is requested that the procedural orders of the panel limiting the submission of evidence be vacated, that the subpoenas requested to require the attendance of rebuttal witnesses be issued, that the panel's yet to be issued ruling dismissing certain of plaintiff's claims be vacated on the ground that a fair opportunity for the presentation of evidence was not presented, and that the hearing dates be extended sufficiently to make that possible.

Respectfully submitted,
Arthur M. Wisehart

WISEHART & KOCH
19 West 44th Street
Suite 412
New York, New York 10036
Attorneys for Plaintiff

Attachment

cc w/attach.: Jonathan S. Liebowitz, Esq., Neutral Arbitrator
Mr. Martin Freeman, Arbitrator (For Plaintiff) Kenneth D.

Kleinman, Esq., Arbitrator (For Defendants)

Counsel for Defendants is:

Steven R. Wall, Esc.
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103-6693

June 5, 1999

IN THE MATTER OF CHARLES POLIN Vs THE KELLWOOD COMPANY

AN ADDENDUM TO THE DISSENT ON FRAUD IN THE INDUCEMENT ETC. . .

I have had an uneasy feeling from the moment I first saw the final opinion as written by Mr. Kleinman. His only reference to the dissent was a footnote in which he made a statement which was untrue. Perhaps he thought it necessary to make his point. He stated that Polin had admitted in his testimony that he had seen D4 on June 20, 1991 at a dinner attended by him, Mr. Golden and Mr. Holding and Jacobsen of Kellwood. I spoke to Mr. Leibowitz about this and he suggested that I call Mr. Kleinman. When I did speak to him he first said that was his interpretation of the testimony. When pressed that he said the opposite he then stated that Polin had no credibility. I could accept a disagreement as to the credibility of a witness as long as is legitimate and consistent. But this was neither. Mr. Kleinman is willing to accept conflicting testimony from Holding and Polin and say is not material. Polin stated that on 6/6/91 he and Holding discussed by phone the possibility of Polin moving to Kellwood in a new area to be headed by Holding. Holding denied the conversation ever occurred. Holding also denied that he had any discussion with Polin on 6/15/91 at a meeting in Atlanta because he didn't know what he would be doing for Kellwood until after he started on 6/17/91. Yet Mr. Kleinman on this discrepancy finds Polin very credible. He based from the outset during discussions on fraud in the inducement Polin's testimony that he had both mentally and verbally accepted Mr. Holding's offer, and Kleinman stated that precluded anything after that acceptance from being fraud in the inducement. Herein is "selective credibility". Polin is suddenly very credible when it fits what Mr. Kleinman is trying to accomplish. By his stating that Polin had seen D4 on 6/20/91 it would indicate that Polin knew then that 75% would

be offshore production. Mr. Kleinman was misstating the testimony. And of course Polin is very credible on the 6/15 because that serves Mr. Kleinman's effort to shorten the time frame of the fraud in the inducement Quash the impact of what was in D4 by stating Polin saw 6/20/91. As to Polin's testimony relative to the 6/20/91 dinner He stated he was shown along with Golden one piece of paper at a time when Mr. Jacobsen had left the table-The paper outlined their salaries. They both expressed dissatisfaction with the numbers and were told not to discuss it front of Jacobsen, and it would be made up on the back end. Polin when questioned by Mr. Wisehart as to what the paper he saw most resembled, and his answer was P7 or P4. Very selective credibility-. The impossibility of D4 being produced four days after Mr. Holding began did not stop Mr. Kleinman from misrepresenting it as evidence.

The panel had several discussions early in the proceedings relative to analyzing the evidence fairly, regardless of who selected them. I can state without any concern of dispute from the other members of the panel that I did that consistently. If the truth is not material, what is? "Selective Credibility" or convoluting the facts and the evidence? At this point I would like to deal with Mr. Leibowitz's role in the proceedings. From the outset he made every effort to allow the plaintiff to present it's case. There was one brief point when Mr. Wisehart suggested that Mr. Leibowitz was not impartial and that upset him, but he quickly put that behind him and continued on in a fair manner. Things became very heated in a conference over Mr. Wisehart's request for four subpoenas. That was resolved in a private panel meeting and the panel advised the other parties to the call that a decision as to the subpoenas would be rendered after the completion of the first defense witness on Monday, 10/26/98. subsequently on the Friday before the last hearings were to commence Mr. Wisehart file a charge with the AAA relative to partiality shown by Mr. Leibowitz, and he was justifyably enraged. Arrangements were made to address this situation on Monday morning before the hearing started. On Monday

Mr. Wisehart refused to withdraw the charges when given the opportunity. He was told that he would be given the opportunity to prove his charges at the conclusion of the case. Thus the final week opened under this cloud.

In retrospect I believe the panel made two errors. First was the refusal to authorize a subpoena for Dean Thompson. He was the one person who could shed some light on when D4 was prepared. Since he was the one who prepared the document with input from Holding, I would find it interesting to learn how this was accomplished in the first four days. We must remember that Holding testified that he did not know what he would doing until after he started at Kellwood. All this information was gathered in four days. The knowledge that they would have available a complete missy and junior sales staff, that 75% of production would be offshore, that lycra items would be produced in the lingerie plants etc. That last bit of information had to have come from Harding who supposedly was not involved at all at that time. This is so far fetched and ludicrous. It equals the evidence that was shown with the costing of eleven Palmetto items by 6/24/91 . For a company to do this they take the item they bought, they break it down, do a pattern, and figure out the yield (yardage) per pant or short, and that cost plus the labor, buttons, zippers etc. allows them to determine their cost and thereby the selling price. In spite of Mr. Kleinmans claim that it was only one pant the document in evidence shows eleven items. In addition it also gives the pricing domestically, from the Dominican Republic, and from Mexico. the only possibllity was that Holding arrived at Kellwood with all of this data in hands. Thompson might have told the truth. He also might have rebutted some of Harding's testimony.

The second error was relative to Mr. Wisehart's request to recall Mr. Finkelman as a rebuttal witness to Mr. Harding's testimony. The final decision was based on an argument postulated by Mr. Wall and joined by Mr. Kleinman that the person that Mr. Finkelman spoke to was neither an employee or manager of Kellwood and thereby not an agent. Nothing

could be further from the truth They stated he was an independent contractor. The apparel industry has thousands of independent contractors, or multi line representatives handling from two or three or even up eight or ten different lines. They receive the manufacturer's samples with price and delivery terms of the manufacturer, and they as the manufacturer's agent go to those accounts or geographical area that is their's and secure contracts (orders) from those accounts Mr. Haber , the gentleman in question did that for a few Kellwood divisions, and perhaps others. If he was selling goods for Cape Cod/ Cricket Lane he was the agent for Jack Finkelman's company at that time. If it was for Parsons Place/Sag Harbor he would have been the agent for that company and responsible to Harvey Solomon. He could in one given store be an agent for three different Kellwood companies on the same visit to his account if he was soliciting three different buyers and departments. Mr. Finkelman would have to a conversation with Mr. Haber on a California trip with one of his sales where Mr. Haber mentioned laughingly about how Mr. Harding was trying in every way to kill off Mr. Holding's two divisions because it would remove Holding as a possible candidate for the presidency of Kellwood if Mr. McKenna gave up that title. This type of information might have influenced the panel on the matter tortious interference.

Where does this leave us and why have I bothered? Mr. Leibowitz [p]roperly had Mr. Kleinman handle the Wisehart hearing. I believe after the hearing this fine gentleman was greatly disgusted and decided to let Mr. Kleinman start the work up for the final opinion. I decided to write this after receipt of the billing details sent by Mr. Wall's office and the subsequent billing relative to Mr. Kleinman's time. I was troubled with the first set of charges over an 11/2/98 charge of $168.28 for a half hour conference between Mr. Wall and Mr. Kleinman on the sanctions issue. I assumed that sanctions would be discussed by the panel. I decided not to make a fuss about it. With the receipt of the following bills I realized I had made a terrible mistake in not raising the issue

before. In the most recently received bills from Kleinman dated April 30, 1999 for bills through 3/31/99 there was a bill I could not ignore. It made everything crystal clear. On 3/5/99 there is a bill for one and one half hours relative to a discussion and review of the opinion he was writing for the panel with Mr. Wall. At that time neither Mr. Leibowitz nor I had seen the opinion. After all it was not due until April 12th. I was under the impression Mr. Wall would see it at the time as Mr. Wisehart. Mr. Kleinman finally made sense to me. Selective credibility, conflicting testimony is not material etc. consulting and reviewing the opinion. with the defendant's attorney five weeks prior to it being due raises a major question. Who wrote the opinion? Mr. Kleinman or Mr. Wall? The stain of this action reflects on the entire panel because this is the panel's opinion without input from either counsel. Certainly Mr. Leibowitz nor I have done nothing to deserve this. I have known Mr. Leibowitz through two arbitrations. I truly believe him to be fair and impartial. I strongly doubt that had he known Mr. Kleinman was going to consult and review this with Mr. Wall he never would have allowed it. I stated earlier that everything became crystal clear, perhaps I should have described It as being disgustingly muddied. The process has been bastardized, and made the entire year a waste of time. I am curious as to how the AAA would react to this. Mr. Kleinman remarked he did some work for them. Would the ABA find this ethical? Would either body find this acceptable. I would hope not. I would hate to see the legal profession lower their standards. I would hope that the standards remain high. I would hate to believe that the public perception of lawyers as being people of low repute is justified.

Respectfully submitted

Martin Freeman

BEFORE THE ARBITRATION TRIBUNAL
UNDER AGREEMENT DATED FEBRUARY 25, 1998

CIVIL ACTION NO. 93-CV-7876 (RO)

In the matter of

CHARLES S. POLIN
Plaintiff,

vs.

THE KELLWOOD COMPANY,
Defendant.

MEMORANDUM OPINION

Panel of Arbitrators: Jonathan S. Liebowitz, Esq., Chair
Kenneth D. Kleinman, Esq., Member
Martin Freeman, Member

The Panel awards the costs of the arbitration claimed by Kellwood through its attorneys, Morgan, Lewis & Bockius LLP, in a Supplemental Award dated June 1999. The reasons for such Supplemental Award are as follows. The claim is fully substantiated by affidavits of Attorney Angeline, who participated in the case for Kellwood, and by attachments submitted therewith. The opposition by Plaintiff Polin, submitted by Attorney Wisehart, lacks any statement of fact such as an affidavit or affirmation of someone who would have reviewed Kellwood's submission and, perhaps, would have had a factual basis to question it. The documents submitted by Polin simply consist of memoranda written by Attorney Wisehart without a showing of factual support; they constitute a combination of general objections to Kellwood's submissions, an occasional stated specific objection (one of which actually supports Kellwood's claim because it points out that Attorney Wall did not bill for a conference which was billed for by Attorney Angeline, a conference between

them), and no detailed review of Kellwood's submissions with statements as to why such claimed costs are inaccurate or inappropriate. Even with the Panel's permission to respond to Kellwood's reply, a permission granted as a matter of professional courtesy and not as of right, Polin's documents continue to rehash and relitigate issues which have already been determined in this case, including whether or not there should be such an award of costs of the arbitration to Defendant Kellwood. They cite cases which might arguably support Polin's position were it substantiated in the record. But no such factual substantiation has been provided. Polin did not avail himself of the opportunity given by the Panel to request that a hearing be held.

In addition, the detailed, factual information furnished by Kellwood appears to us to suffice to establish the costs to date of this lengthy proceeding (made lengthy in large part because of Attorney Wisehart's repetitiveness and delaying tactics), appears to be reasonable and grounded in the kinds of fees allowed to counsel of such experience for such professional services rendered, and the submitted expenses appear to be substantiated and as such, proper.

Therefore, upon a full review, the Panel finds no basis to question or to reduce the claim made by Kellwood and the Panel awards that claim in full.

Dated: June 23, 1999

Jonathan S. Liebowitz, Esq., Chair

Kenneth D. Kleinman, Esq., Member

Martin Freeman, Member

BEFORE THE ARBITRATION TRIBUNAL
UNDER AGREEMENT DATED FEBRUARY 25, 1998

CIVIL ACTION NO. 93-CV-7876 (RO)

In the matter of

CHARLES S. POLIN
Plaintiff,

vs.

THE KELLWOOD COMPANY,
Defendant.

SUPPLEMENTAL AWARD OF ARBITRATORS

Panel of Arbitrators: Jonathan S. Liebowitz, Esq., Chair
Kenneth D. Kleinman, Esq., Member
Martin Freeman, Member

This Panel's Award of February 8, 1999, having provided for submissions by the parties as to the costs of this arbitration as defined in that Award, and Defendant Kellwood having made its submission, and Defendant Kellwood having stated via affidavit of Attorney Melissa C. Angeline, dated March 17, 1999, with attachments, as amplified by Ms. Angeline's letter of May 17, 1999, a total claim to date for such costs of $290,905.36, and having requested that the Panel direct reimbursement of Kellwood by Attorney Wisehart in the sum of one-half thereof, or $145,452.68;

And Plaintiff Polin, by Attorney Wisehart, having submitted a response thereto dated April 16, 1999, and Defendant Kellwood having replied thereto, by permission of the Panel, under date of May 17, 1999, and Plaintiff Polin, having responded to that reply, by permission of the Panel, under date of June 2, 1999;

And the Panel having considered and deliberated upon the respective submissions of the parties and upon the entire record of the hearings in this case, including the Panel's Award of February 8, 1999 and all of the testimonial and documentary evidence of record, and having considered the submissions of the parties on the issue at hand, awards as follows:

1. Defendant Kellwood's application for an award of costs of this arbitration as defined in the Panel's Award of February 8, 1999, is sustained. Those costs to date are determined to amount to the sum of $290,905.36. Plaintiff Polin's share thereof, to be paid to Defendant Kellwood by Attorney Wisehart, amounts to $145,452.68 to date.

2. Attorney Arthur Wisehart is directed to promptly pay to Defendant The Kellwood Company the sum of $145,452.68.

3. Defendant Kellwood is granted leave to submit an application for a Supplemental Award of costs of this arbitration upon receipt by its attorneys of final billing statements from Arbitrators Kleinman and Liebowitz. Plaintiff Polin shall have 15 calendar days from the date of such further submission to respond thereto. Upon receipt of such submissions, the Panel will render a Second Supplemental Award finally determining the issues of amount of costs of this arbitration as defined in its Award of February 8, 1999, in addition to the costs awarded herein.

IT IS SO ORDERED.

Dated: June 23, 1999

Jonathan S. Liebowitz, Esq., Chair

Kenneth D. Kleinman, Esq., Member

Martin Freeman, Member

STATE OF NEW YORK)
ss:
COUNTY OF WESTCHESTER)
On this 23rd day of June, 1999, before me personally came and appeared Jonathan S. Liebowitz, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public, State of New York

JOSEPH MONACO, JR.
Notary Public, State of New York
No. 03-5004213
Qualified in Bronx County

COMMONWEALTH OF PENNSYLVANIA)
ss:
COUNTY OF CHESTER)
On this day July, 1999, before me personally came and appeared Kenneth D. Kleinman, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public, Commonwealth of Pennsylvania

NOTARIAL SEAL
BARBARA J. HAEDEL, Notary Public
West Conshocken Boro., Montgomery Co.
My Commission Expires August 6, 2001

STATE OF FLORIDA)
ss:
COUNTY OF PALM BEACH)
On this 16 day July, 1999, before me personally came and appeared Martin Freeman, to me known and known to me to

be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public, State of Florida

JUDITH M. FERESTAD
MY COMMISSION # CC 684128
EXPIRES September 29, 2001
Bonded Thru Notary Public Underwriters

July 3, 1999

DISSENT ON THE AWARD OF ARBITRATORS

I cannot in good conscience agree to the award based on several items I have noted to both arbitrators left unanswered. The idea of "going along" and getting it finished with these questions hanging is unacceptable. I will list the areas which I question. Specifically I refer to calls between Mr. Kleinman and Mr. Wall. On 8/14/98 a conference call between the two relative to the conference call that was to occur between all the parties in the case. On 10/21/98 a conference call between the same two parties relative to another conference that was to take place between all the parties in the case. On 10/12/98 Mr. Wall called Mr. Kleinman to confer about the arbitration award. This call might have included Mr. Pollihan as well, but that is not certain. I wish to point out that all of this occurred prior to the defence case being presented and the uproar over the submission by Mr. Wisehart of the complaint to the American Arbitration Association. And on 11/2/98 a call from Mr. Wall to Mr. Kleinman relative sanctions, this being the Monday after the last hearing was held.

Subsequently on 2/14/99 a short call between the two (Wall & Kleinman) RE interpreting the award. Last, at least to my knowledge, was the 3/5/99 call in reviewed the opinion he was writing on behalf of the panel with Mr. Wall. Perhaps it just me who finds these things at best irregular. I seem to recall many admonitions by Mr. Leibowitz that the panel discussions are confidential as are the decisions. I do not believe that admonition was to me alone. I heard at other times the expression EX PARTE. I was told that those type of discussions are wrong and not legal. It might come as a surprise but I have a respect for the law. Perhaps I failed by not advising Mr. Wisehart of everything the panel had said privately, but I took that admonition seriously and upheld it. Would that everyone had done that. The worst part of this is that prior to this being known Mr. Leibowitz gave the

approval to Mr. Kleinman to prepare the opinion and award. I state once again that had he known that Mr. Kleinman was going to have Mr. Wall give his input, I doubt that he would have concurred. These are the things that trouble me deeply. I must dissent on the award. I believe it is contaminated by the action I have mentioned herein.

Respectfully submitted,

Martin Freeman

August 19, 1999

A STATEMENT: re WISEHART SUBMISSION OF LAW

It is incumbent upon me to clarify a few things relative to quotes attributed to me in Mr. Wisehart's submission. First and foremost he had no right to do this and he knew that. He knew full well that this was an internal matter between the arbitrators and was never intended as another dissent on "fraud in the inducement". Mr. Wisehart had been in touch with me on a couple of occasions expressing concern about the award. I did not discuss that with him other than to listen to him state that it could ruin him. In the meantime I continued to reread everything as I had done in the instance of Mr. Kleinman's footnote reference to my dissent on fraud in the inducement in the final opinion. In my reading of everything I came across some billings sent by Ms. Angeline in February that gave me some concerns. When I received additional billings from her in May I became furious. I discussed it with Mr. Liebowitz and subsequently sent him a scathing report relative to what I believed were improper actions between Mr. Kleinman and Mr. Wall. Mr. Liebowitz forwarded my report to Mr. Kleinman who in seeing it understood the way it appeared to me. In a rather long call he explained to me the details of the six instances that I cited to my complete satisfaction. At the conclusion he asked if I would be willing to sign of f on the award, and I said send it. I signed it, had it notarized and sent it in. In a call from Mr. Wisehart he asked if I had anything I that could help .This was prior to my call from Mr. Kleinman.. He asked me to send it to him. I did not. The following week I had a call from Joan Lipton saying that they hadn't received anything. This was one of several calls from her. I told her there was nothing they could use from it. I mailed it. Somewhere in the next few days they received their copy of the award with my signature on it. That brought two calls from Mr. Wisehart urging me to an affidavit including the three documents I had done. The reason was according to him that by my signing the award I had negated my dissent on fraud in the

inducement. I said I wouldn't. Over the next week had three or four more calls from Joan making the same point on behalf of Mr. Wisehart. I told her the only one that mattered was the one that dealt with facts in the case.

To the point of this statement. I owe an apology to Mr. Kleinman and to Mr. Wall for allowing this to fall into Mr. Wiseharts hand. I mark myself an idiot for believing he would act ethically. He has deliberately submitted quotes that he knew were not valid in order to give the reader the impression that this was currently my belief. I had refused to do what he asked, so he fraudently submits this, aware that I had repudiated it to accomplish what he wanted. Had I thought back to October and his actions on the eve of the last hearings with his missile to the AAA on his charge against Mr. Liebowitz for partiality, followed by his refusal to submit proof, I should have expected this. I will leave the other material in his submission to others far more qualified than me to refute.

Respectfully submitted

Martin Freeman Arbitrator

MEMORANDUM

November 1, 1999

TO: Steven R. Wall, Esq.
Morgan, Lewis & Bockius, LLP

Arthur M. Wisehart, Esq.
Wisehart and Koch, Esqs.

FROM: Jonathan S. Liebowitz, Esq. Panel Chair

SUBJECT: In the Matter of Charles S. Polin vs.
The Kellwood Company

Enclosed please find the Panel's duly executed Second Supplemental Award, dated October 20, 1999, in the above case.

We appreciate the opportunity to be of service.

JSL/daa
Enclosure
copy to: Kenneth D. Kleinman, Esq.
Martin Freeman

BEFORE THE ARBITRATION TRIBUNAL
UNDER AGREEMENT DATED FEBRUARY 25, 1998

CIVIL ACTION NO. 93-CV-7876 (RO)

In the matter of

CHARLES S. POLIN
Plaintiff,

vs.

THE KELLWOOD COMPANY,
Defendant.

SECOND SUPPLEMENTAL AWARD OF ARBITRATORS

Panel of Arbitrators: Jonathan S. Liebowitz, Esq., Chair
Kenneth D. Kleinman, Esq., Member
Martin Freeman, Member

This Panel's Supplemental Award of June 23, 1999, having granted leave to Defendant Kellwood to submit an application for a Supplemental Award of costs of this arbitration upon receipt by its attorneys of final billing statements from Arbitrators Kleinman and Liebowitz;

And the Supplemental Award having provided further for Plaintiff Polin to have an opportunity to respond to such an application, and that upon receipt of such submissions, the Panel would render a Second Supplemental Award finally determining the issues of amount of costs of this arbitration as defined in its Award of February 8, 1999, in addition to the costs awarded in the Supplemental Award;

And Defendant Kellwood having made its submission and attachments dated September 17, 1999, with a cover letter from Attorney Melissa C. Angeline, dated the same date;

And Plaintiff Polin, by Attorney Wisehart, having submitted a letter response thereto dated September 24, 1999;

And Defendant Kellwood having responded by letter of October 4, 1999, signed by Attorney Steven R. Wall;

And Plaintiff Polin, by Attorney Wisehart, having responded thereto by letter dated October 13, 1999;

And the Panel having considered and deliberated upon the parties' submissions and upon the entire record of the hearings in this case, including the Panel's Award and its Supplemental Award, and the Panel noting that Plaintiff Polin, by Attorney Wisehart, has not shown any factual basis to question the instant submission by Defendant Kellwood, and the Panel having considered the request for documents contained in Plaintiff Polin's submissions by Attorney Wisehart, and the Panel noting the lack of any valid legal or factual basis for such request, and said document request appearing to the Panel to be without merit and improper, the Panel awards as follows:

1. Defendant Kellwood's application for a Supplemental Award of costs of this arbitration as defined in the Panel's Award of February 8, 1999, is sustained. Those supplemental costs are determined to amount to the sum of $15,569.92. Plaintiff Polin's share thereof, to be paid to Defendant Kellwood by Attorney Wisehart, amounts to $7,784.96.

2. Attorney Arthur Wisehart is directed to promptly pay to Defendant The Kellwood Company the sum of $7,784.96, in addition to the sum of $145,452.68 awarded in the Panel's Supplemental Award of June 23, 1999.

3. The Panel notes that there are and may be additional costs of the arbitration via billings to Defendant Kellwood by Arbitrators Kleinman and Liebowitz for services rendered beyond those covered by this Second Supplemental Award.

Therefore, Defendant Kellwood is granted leave to submit an application for a Third Supplemental Award of costs of this arbitration upon receipt by its attorneys of any further billing statements from Arbitrators Kleinman and Liebowitz. Plaintiff Polin shall have 15 calendar days from the date of such further submission, if any, to respond thereto. Upon receipt of such submissions, the Panel will render a Third Supplemental Award further determining the issues of amount of costs of this arbitration as defined in its Award of February 8, 1999, in addition to the costs awarded herein and in the Panel's Supplemental Award of June 23, 1999.

IT IS SO ORDERED.

Dated: October 20, 1999

Jonathan S. Liebowitz, Esq., Chair

Kenneth D. Kleinman, Esq., Member

Martin Freeman, Member

STATE OF NEW YORK)
ss:
COUNTY OF WESTCHESTER)

On this 20th day of October, 1999, before me personally came and appeared Jonathan S. Liebowitz, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to at he executed the same.

Notary Public, State of New York

FRED C. KLEIN
Notary Public, State of New York
No. 30-7292525
Qualified in Nassau County
Commission Expires August 31, 2000

COMMONWEALTH OF PENNSYLVANIA)
ss:
COUNTY OF CHESTER)

On this 25th day of October, 1999, before me personally came and appeared Kenneth D. Kleinman, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public, Commonwealth of Pennsylvania

NOTARIAL SEAL
SHELLY L. BURDY, Notary Public
Warwick Twp., Chester County
My Commission Expires May 19, 2003

STATE OF FLORIDA)
ss:
COUNTY OF PALM BEACH)

On this day of October, 1999, before me personally came and appeared Martin Freeman, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public, State of Florida

JEANNE HOOVER
MY COMMISSION # CC 663339
EXPIRES: July 14, 2001
Bonded Thru Notary Public Underwriters

Law Offices
MORGAN, LEWIS &
BOCKIUS LLP
101 Park Avenue
New York, New York 10178
(212) 309-6062

1701 Market Street
Philadelphia, Pennsylvania 19103
(215) 963-4928

ATTORNEYS FOR RESPONDENT
THE KELLWOOD COMPANY

U.S. DISTRICT COURT
FILED
JAN 25 2000
S.D. OF N.Y.

CIVIL ACTION NO. 93 Civ. 7876 (RO)
#00,1718

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF NEW YORK

CHARLES S. POLIN,
Petitioner,

-against-

KELLWOOD COMPANY, KELLWOOD SPORTSWEAR,
ENOCH HARDING, JR. and HARRY HOLDING,
Respondents.

ORDER AND FINAL JUDGMENT

This matter having come before this Court upon petitioner Charles S. Polin's ("Polin") Petition to Vacate Award in Arbitration, For a Stay and for Other Relief and all amendments and supplements thereto, and the opposition of respondent The Kellwood Company's ("Kellwood") thereto, and Polin's Notice of Motion to Strike, and to Impose Liability Pursuant to Judiciary Law 487 and 28 U.S.C. § 1927, and the opposition of Kellwood thereto, and upon Kellwood's

supplemental awards thereto, and the opposition of Polin thereto, and together with supporting documents, and a hearing having been held on November 19, 1999 before the Honorable Richard Owen and the Court having rendered a decision on June 29, 2000;

Now, therefore, it is hereby:

ORDERED that Polin's Petition to Vacate Arbitration Award, and all amendments and supplements thereto, and Polin's Motion to Strike and to Impose Liability, are DENIED in their entirety; and it is further

ORDERED that Kellwood's Motion to Confirm the Arbitration Award and all supplemental awards thereto is GRANTED; and it is further

ORDERED that Petitioner's counsel, Arthur M. Wisehart, Esquire, shall pay Kellwood, within fifteen (15) days of the date of this Order, the total sum of$153.237.64, pursuant to the Arbitration Panel's Supplemental Award dated June 23, 1999 and the Second Supplemental Award dated October 20, 1999.

JUDGMENT is hereby entered in favor of Respondent and against Petitioner and Arthur M. Wisehart, Esquire, as described above.

Dated: New York, New York July 20, 2000

Enter:
U.S.D.J.

Docket Number 00-9184

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Charles S. Polin, Plaintiff

Arthur M. Wisehart, Appellant

v.

Kellwood Company, Defendant-Appellee

MOTION INFORMATION FORM

Motion for Stay of Mandate

MOTION BY: (Name, address and tel. no. of law firm and of attorney in charge of case)

Arthur M. Wisehart, Appellant
60 East 42nd Street, Suite 7614
New York, New York 10165
(212) 953-8926

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and attorney in charge of case)

Christopher A. Parlo, Esq.
Morgan, Lewis & Bockius
101 Park Avenue
New York, New York 10178
(212) 309-6273

Has consent of opposing counsel:

A. been sought?	X No
B. been obtained?	X No

Has service been effected? X Yes
Is oral argument desired? X No
(Substantive motions only)

Has argument date of appeal been set:
A. by scheduling order? X Yes
B. by firm date/argument notice? X Yes
C. If yes, enter date: April 18. 2002
Petition for Rehearing denied on June 14, 2002.

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below?
(See F.R.A.P. Rule 8.) not applicable

Any previous request for similar relief made to the 2nd Circuit? not applicable

Would expedited appeal eliminate need for this motion?
If no, explain why not: not applicable

Will the parties agree to maintain the status quo until the motion is heard? X No

Judge or agency whose order is being appealed:
Hon. Richard Owen, U.S.D.J., S.D.N.Y.

Brief statement of the relief requested: A stay of the Mandate pending determination of the petition for a writ of certiorari that appellant will file within the time allowed is respectfully requested under Fed. R. App. P. 41(d) (2)

By: (Signature of Attorney)

Signed name must be printed beneath. Arthur M. Wisehart
June 20, 2002

Appellant
Appearing for: (Name of Party)

Appellant or Pro Se: X Plaintiff

ORDER

Before: Hon. James L. Oakes, Hon. Dennis Jacobs, Hon. Guido Calabresi, Circuit Judges IT IS HEREBY ORDERED that the motion be and it hereby is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

Arthur M. Heller
Motions Staff Attorney
Filed June 11, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd of April, , two thousand and two.

PRESENT: HON. JAMES L. OAKES,
HON. DENNIS JACOBS,
HON. GUIDO CALABRESI,
Circuit Judges.

00-9184

CHARLES S. POLIN,
Plaintiff,

ARTHUR M. WISEHART,
Appellant,

-v.-

KELLWOOD COMPANY,

Law Offices
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
(212) 309-6062

1701 Market Street
Philadelphia, Pennsylvania 19103
(215) 963-4928

ATTORNEYS FOR RESPONDENT
THE KELLWOOD COMPANY

CIVIL ACTION NO. 93 Civ. 7876 (RO)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES S. POLIN,
Petitioner,

-against-

KELLWOOD COMPANY, KELLWOOD SPORTSWEAR,
ENOCH HARDING, JR., and HARRY HOLDING,
Respondents.

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that the attached Order and Final Judgment, entering judgment pursuant to the Court's Order and Opinion dated June 29, 2000, is a true copy of the Order and Final Judgment duly made in the within proceeding and was filed and entered in the office of the Clerk of the United States District Court for the Southern District of New York on July 26, 2000.

Dated: New York, New York August 2, 2000

MORGAN, LEWIS & BOCKIUS LLP
CHRISTOPHER A. PARLO (CP-43 10)
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178-0060
(212) 309-6062

STEVEN R. WALL
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19 103-6993
(215) 963-4928

Attorneys for Respondent
The Kellwood Company

TO: ARTHUR M. WISEHART, ESQ.
WISEHART & KOCH
Suite 412
19 West 44th Street
New York, NY 10036

Attorney for Petitioner
Charles S. Polin

S.D.N.Y.
93-Civ-7876
Owen, J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of February Two thousand and one,

Present:

Hon. John M. Walker, Jr.,
Chief Judge
Hon. Fred I. Parker,
Hon. Robert A. Katzmann,
Circuit Judges.

00-9184

Charles Polin,
Plaintiff-Appellant,

v.

Kellwood Company, et al.,
Defendants-Appellees.

Appellant Charles Polin has filed a motion for a stay of the execution of the district courts order and a stay against execution of a sanction imposed against appellant's counsel pending appeal. Upon due consideration, it is ORDERED that the motion is granted for ten days from the filing of this order for the limited purpose of allowing appellant's counsel, Arthur Wisehart, to post a supersedeas bond in the amount of $ 153,237.64. See Fed. R. Civ. P. 62(d). If Wisehart fails to file a supersedeas bond as required by this order, the stay will

full.

FOR THE COURT:

Roseanne B. MacKechnie, Clerk

Fidelity and Deposit Company of Maryland
Home Office: P.O. Box 1227, Baltimore, MD 21203-1227

Bond No. COB 3563-914

SUPERSEDEAS BOND

CIVIL ACTION NO. 93 Civ. 7876 (RO)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES S. POLIN,
Petitioner,

-against-

KELLWOOD COMPANY, KELL WOOD SPORTSWEAR, ENOCH HARDING, JR., and HARRY HOLDING,
Respondents.

WHEREAS, Appellant's counsel Arthur M. Wisehart, has prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, from the order and final judgment entered the 26th day of July, 2000, in the office of the Clerk of the above-named Court, against the said Appellant, and appellant's counsel, Arthur M. Wisehart and in favor of Respondents, Appellees in the amount of One Hundred Fifty Three Thousand Two Hundred Thirty Seven and 64/100 —($153,237.64)—Dollars.

NOW, THEREFORE, the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, duly authorized to transact business pursuant to the Act of Congress approved August 13, 1894, of New York, 111 John Street, Suite 1610, New York, New York 10038, does hereby undertake in the sum of One Hundred Fifty Three Thousand

that if the above-named Appellant's counsel, Arthur M. Wisehart shall satisfy the judgment herein in full together with cost, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest, and damages as the Appellate Court may adjudge and award, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

DATED, New York, February 6th, 2001.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND

By:
Rosemary Roberto, Attorney-in-fact

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

SDNY
93 -cv-7876
Owen

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of June two thousand two.

Dkt #: 00-9184

Charles S. Polin,
Plaintiff,

Arthur M. Wisehart,
Appellant,

Kellwood Company,
Defendant -Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Arthur M. Wisehart

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ROSEANN B. MACKECHNIE

By:
Arthur M. Heller,
Administrative Attorney

AGREEMENT TO ARBITRATE DISPUTE

WHEREAS, Charles S. Polin ("Polin") filed a lawsuit against The Kellwood Company, Kellwood Sportswear, Enoch Harding, Jr., and Harry Holding, in the United States District for the Southern District of New York, Civil Action No. 93-7876 (RO) ("the Action"), alleging various claims in connection with his employment and termination from employment with the Kellwood Company;

WHEREAS, Polin and The Kellwood Company ("Kellwood") have determined that it is in their mutual best interest to submit to final and binding arbitration all of the claims brought by Polin in the above-captioned lawsuit;

IT IS HEREBY AGREED, by and between Polin and Kellwood as follows:

1. Agreement to Arbitrate - Polin and Kellwood agree to submit to final and binding arbitration the claims raised by Polin in the above-captioned lawsuit, subject to the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("the Rules"), and the terms and conditions of this Agreement. The parties further agree that in the event the terms of this Agreement are in conflict with the Rules, the terms of this Agreement shall control.

2. Judicial Review and Enforcement - In the event that either Polin or Kellwood seeks review of the final and binding arbitration award, the parties agree that the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 10, 11, shall apply to such review, that such review shall be sought in the United States District for the Southern District of New York in the action captioned Polin v. Kellwood Company, et al., Civil Action No. 93-7876 (RO), and that the jurisdictional basis for such request for review shall be the complete diversity of citizenship which exists between Polin and

review of the final and binding arbitration award under this Agreement must be filed within sixty (60) days of the date of the award, or such right of review shall be waived.

3. Stipulation to Adjourn - The parties agree to authorize their counsel to sign and file a Stipulation to Adjourn the pending Action, contemporaneous with the signing of this Agreement, in the form attached as Exh. A to this Agreement.

4. Selection of Arbitrators - The parties agree to submit to arbitration before a panel of three arbitrators, with one arbitrator being selected by Polin, one arbitrator being selected by Kellwood, and the third "neutral" arbitrator selected jointly by the parties. In accordance with this paragraph, Mr. Polin selects Martin Freeman, Esq., Kellwood selects Kenneth Kleinman, Esq., and the parties jointly select as the neutral arbitrator Jonathan S. Liebowitz, Esq. In the event that the neutral arbitrator is subsequently unable to serve and resigns, the parties agree to attempt to designate jointly an alternative "neutral" arbitrator within the thirty (30) day period following the initial neutral's resignation. Failing such agreement, the parties agree that they shall jointly petition the American Arbitration Association to select a "neutral" arbitrator in accordance with the Rules. In the event that either party's designated arbitrator is unable to serve and resigns, the affected party shall have 30 days in which to appoint an alternative arbitrator.

5. Time and Place of Arbitration - The parties agree that the arbitration shall be held at specific times to be determined by the arbitration panel. The arbitration shall take place within the City of New York at the offices of Morgan, Lewis & Bockius.

6. Pre-Hearing-Procedure and Conduct of Hearing - The pre-hearing procedure and arbitration hearing shall be conducted according to the Rules of the American Arbitration Association, subject to the following:

a. The parties may submit post-hearing briefs, on a schedule to be determined by the arbitration panel;.

b. Kellwood shall conclude the deposition of Polin within thirty (30) days from the signing of this Agreement;

c. Kellwood will allow Polin the opportunity to inspect, and copy at his own expense, documents which Kellwood has deemed responsive and non-objectionable to Polin's various discovery requests. Such inspection shall take place in the Philadelphia office of Morgan, Lewis & Bockius within 30 days from the signing of this Agreement;

d. Neither party shall be entitled to any further discovery except as noted in subparagraph b and c above;

e. The parties shall exchange pre-hearing memoranda containing an identification of witnesses and a summary of their expected testimony, a listing (and copy if requested) of exhibits to be offered at the hearing, a designation of expert witnesses, if any, containing the information required in Federal Rule of Civil Procedure 26(a)(2), and a statement of the legal issues involved, on the following schedule:

1. Polin to submit his pre-trial memorandum to the three designated arbitrators and counsel for Kellwood no later than March 9, 1998;

2. Kellwood to submit its responsive pre-trial memorandum to the three designated arbitrators and counsel for Mr. Polin no hater than March 23, 1998;

3. Polin to submit any reply pre-trial memorandum to the three designated arbitrators and counsel for Kellwood no later than March 30, 1998;

4. A pre-hearing telephone conference shall be held with the arbitration panel at a time designated by the panel, in the

ten day period preceding the opening of the arbitration hearing on April 1, 1998.

7. Remedies - The parties agree that the arbitration panel shall have the authority to provide whatever remedies arc currently available under law for the claims asserted by Polin in the action captioned Polin v. Kellwood Company. et a!, Civil Action No. 93-7876 (RO), as part of its final and binding arbitration award.

8. Expense of Arbitration - The parties agree to allocate the expense of the arbitration as follows:

1. Polin will pay the full costs of the arbitrator selected by Polin;

2. Kellwood will pay the administrative costs of the arbitration, the full costs of the arbitrator selected by Kellwood and the full costs of the neutral arbitrator.

9. Assumption of Liability - In exchange for Polin's agreement to execute this Agreement, and to stipulate to the dismissal with prejudice of Defendants Kellwood Sportswear, Enoch Harding, Jr., and Harry Holding in the form attached as Exh. A to this Agreement, Kellwood agrees to assume any and all liability for those claims which have been asserted against Kellwood Sportswear, Enoch Harding, Jr., and Harry Holding in the above-captioned action.

WHEREFORE, and intending to be legally bound, the parties hereby execute this foregoing Agreement this 25th day of February, 1998.

Witness:

Charles Polin

Attest:

THE KELLWOOD COMPANY

By: